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In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

COALITION FOR CLEAN AIR, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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52 pp

QUESTION PRESENTED

Whether, despite Congress's determination that the development of local air pollution control measures under the 1990 Amendments to the Clean Air Act is initially the responsibility of State and local governments, EPA is required to promulgate federal air pollution control plans for major urban areas in California because EPA found in 1988 that California had failed to meet requirements of the pre-1990 Act, even though those requirements were later repealed by the 1990 Amendments and replaced with new requirements that California has not yet had the opportunity to meet.

PARTIES TO THE PROCEEDINGS BELOW

The appellants before the court of appeals in No. 91-55383 were the Coalition for Clean Air and Sierra Club, Inc. The appellant before the court of appeals in No. 91-55386 was the South Coast Air Quality Management District (SCAQMD). The appellees in both cases were the United States Environmental Protection Agency (EPA), William K. Reilly, Administrator, Daniel G. McGovern, Regional Administrator, and David P. Howekamp, Director, Air and Toxics Division, EPA Region IX.

The Southern California Association of Governments intervened in the court of appeals in support of EPA. The Environmental Council of Sacramento and Sierra Club, Inc. participated in the court of appeals as *amici curiae* in support of the appellants.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Environmental Protection Agency (EPA) and William K. Reilly, Administrator, et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-34a) is reported at 971 F.2d 219. The opinion of the district court (App., *infra*, 35a-43a) is reported at 762 F. Supp. 1399.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1992. A petition for rehearing was denied on September 11, 1992. App., *infra*, 44a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Clean Air Act, 42 U.S.C. 7401 *et seq.*, as amended, are reproduced at App., *infra*, 45a-47a.

STATEMENT

1. The Clean Air Act establishes a comprehensive program for controlling and improving the nation's air quality, through a combination of state and federal regulation. The basic allocation of state and federal roles in the present Act was established by the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676. Congress charged the Administrator of EPA with developing "national * * * ambient air quality standards" (NAAQS). Section 109(a)(2), 42 U.S.C. 7409(a)(2). Congress then required each State to develop and submit to EPA a state implementation plan (SIP) to achieve and maintain the NAAQS within the State. Section 110(a)(1), 42 U.S.C. 7410(a)(1). The Administrator was required to determine whether each SIP met certain statutory requirements, including the attainment of applicable "primary" NAAQS, "as expeditiously as practicable" but generally not later than three years from the date of approval of the SIP. Section 110(a)(2)(A), 42 U.S.C. 7410(a)(2)(A). If a State failed to submit a SIP, or if the Administrator determined that a SIP failed to meet the Clean Air Act's requirements, the Administrator was required to promulgate a federal implementation plan (FIP) for the State within six (or in some cases eight) months. Section 110(c)(1), 42 U.S.C. 7410(c)(1).

In the early 1970s, EPA established NAAQS for photochemical oxidants (ozone) and carbon monoxide (CO).[1] The Los Angeles area was one of the areas that needed a

[1] See 42 C.F.R. 410.9, 410.8 (1972). EPA changed the chemical designation of the photochemical oxidants standard to ozone in 1979. 40 C.F.R. 50.9 (1980).

SIP to attain those standards. California failed to produce an adequate SIP and, consequently, EPA was required to promulgate a FIP for the area. See generally *City of Santa Rosa* v. *EPA*, 534 F.2d 150, 154 (9th Cir. 1976) (upholding the promulgated FIP). To attain the standards, substantial emission reductions were required. After several attempts to find more palatable solutions, EPA reluctantly issued a FIP that called for, among other things, massive gasoline rationing and drastic transportation control measures. *Ibid.*; see 53 Fed. Reg. 49,494, 49,498 (1988). Public outrage led EPA to withdraw the plan just as Congress was in the midst of efforts to amend the Act. See 41 Fed. Reg. 45,565 (1976).

In response to widespread state failures to produce adequate SIPs and the public uproar over FIPs that EPA had promulgated to address those failures, Congress overhauled the Clean Air Act in 1977. The committee report accompanying the House of Representatives bill to revise the Act recognized that FIPs were a crude tool for remedying state failures under the 1970 Act, and concluded that the wisest course for the new Act was to adopt "an approach that is intended to involve the least possible intrusion into State affairs consistent with the primary task of protecting public health." H.R. Rep. No. 294, 95th Cong., 1st Sess. 288 (1977), *reprinted in* 4 *Legislative History of the Clean Air Act Amendments of 1977*, at 2748, 2755 (1978) [hereinafter *Leg. Hist.*]. The Report stressed the need for States to adopt and implement their own transportation control programs, stating that "as a practical matter, State and local governments are in a better position than EPA to resolve those pollution problems, which involve millions of motor vehicles." *Ibid.*[2]

[2] Similarly, the committee report on the Senate bill to amend the Act (S. 252) recognized the substantive and practical differences between SIPs and FIPs when it stated that the bill had been designed to take into account that "[t]he Federal Government does not have and will not have the resources to do an effective job of

Accordingly, the 1977 Amendments maximized pressure on the States to develop adequate plans. The Amendments created a new concept, "nonattainment areas"—areas where air quality falls short of NAAQS—and required SIPs for such areas to satisfy stringent new requirements set forth in the new Part D of the statute; failure to meet those requirements would result in imposition of draconian economic sanctions on the affected areas. Sections 110(a)(2)(I), 171, 172(b), 176(a), 42 U.S.C. 7410(a)(2)(I), 7501, 7502(b), 7506(a). Congress extended the deadline for attainment of the primary NAAQS in nonattainment areas to December 31, 1982. Section 172(a)(1), 42 U.S.C. 7502(a)(1). Further extensions were permitted for ozone and carbon monoxide, but only if the State demonstrated that attainment was not possible by 1982, despite the implementation of all reasonably available measures, and that attainment would be achieved "as expeditiously as practicable but not later than December 31, 1987." Section 172(a)(2), 42 U.S.C. 7502(a)(2).

2. In 1978, the EPA Administrator designated the South Coast Air Basin in California (comprising most of Los Angeles, San Bernardino, Orange and Riverside Counties) as nonattainment areas for carbon monoxide and ozone. See 43 Fed. Reg. 8962, 8964 (1978). In 1979, California submitted its SIP for the South Coast area; EPA, with limited exceptions, approved that SIP. 47 Fed. Reg. 28,617 (1982). California also requested, and EPA approved, an extension of the statutory attainment date for the South Coast from 1982 to December 31, 1987. See 47 Fed. Reg. 50,864 (1982). As required, the State submitted updated 1982 ozone and CO SIPs for the South Coast area. In 1984, EPA approved parts of the 1982 South Coast plans. 49 Fed. Reg. 30,300 (1984).

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running the air pollution control programs of the States." S. Rep. No. 127, 95th Cong., 1st Sess. 10 (1977), *reprinted in* 3 *Leg. Hist.* 1384.

On November 3, 1987, the Ninth Circuit vacated EPA's 1984 partial approval of the 1982 South Coast SIPs. *Abramowitz* v. *EPA*, 832 F.2d 1071 (9th Cir. 1987). On January 22, 1988, EPA disapproved the 1982 South Coast plans on the ground that, *inter alia*, they failed to demonstrate attainment of the NAAQS by the December 1987 statutory attainment date, as required by Section 172(a) of the Act. See 53 Fed. Reg. 1780 (1988).[3]

In February 1988, two environmental groups brought this case under the citizen suit provision, Section 304 (a)(2) of the Act, 42 U.S.C. 7604(a)(2), to compel EPA to promulgate ozone and carbon monoxide FIPs for the South Coast area pursuant to Section 110(c)(1), 42 U.S.C. 7410(c)(1). In March 1989, EPA entered into a settlement agreement which, after court-approved modifications, obligated EPA to promulgate federal plans in final form by February 28, 1991. The settlement agreement allowed EPA to seek vacation of its FIP obligations if amendments to the Act then pending in Congress obviated the duty to prepare a FIP. EPA issued a proposed FIP in September 1990. 55 Fed. Reg. 36,458 (1990).

3. In the years leading up to 1990, it had become increasingly clear that several areas of the country with severe air pollution problems, including the Los Angeles

[3] While the South Coast has not had a plan demonstrating attainment of the national standards, it has had in place a series of enforceable regulations governing emissions from a wide range of stationary sources. See, *e.g.*, South Coast Air Quality Management District Rules 1175 (foam products), 1153 (commercial bakeries), 1121 (residential water heaters), 1150 (landfills). In addition, the California Air Resources Board has adopted new measures and strengthened existing measures with respect to those sources in order to comply with the requirements of the California Clean Air Act. See, *e.g.*, 57 Fed. Reg. 909 (1992) (proposed waiver of federal preemption for amendments to California's stringent "low-emission vehicle" standards for light and medium-duty vehicles); 56 Fed. Reg. 45,866 (1991) (proposed waiver of preemption for non-road engine and vehicle exhaust emission standards); see generally Cal. Code Regs. tit. 17, §§ 94500-94517 (emission standards for consumer products.).

area, could not possibly meet the ambitious requirements of the 1977 Amendments without extreme economic dislocation. On November 15, 1990, the Clean Air Act Amendments of 1990 were enacted. Pub. L. No. 101-549, 104 Stat. 2422-2423. Among other things, Congress completely revised the Part D nonattainment provisions of the Act. In so doing, Congress repealed the provisions of Section 172 that had required SIPs for the South Coast area to demonstrate attainment by December 31, 1987. Those provisions, of course, had formed the basis for EPA's disapproval of the California SIP submissions, and thus the statutory justification for that disapproval was eliminated by the 1990 Amendments. Congress replaced those provisions with a detailed scheme of new requirements and extended deadlines specifically applicable to ozone and CO nonattainment SIPs. Sections 171-193, 42 U.S.C. 7501-7515.

In particular, the 1990 Amendments established five classifications of ozone nonattainment areas depending on the degree of severity of each area's ozone problem—ranging from "marginal" to "extreme"—and two classifications of CO nonattainment areas. The Amendments also set new, extended deadlines for the attainment of the primary NAAQS for each classification. 42 U.S.C. 7511(a)(1) and 7512(a)(1) (Supp. II 1990). Congress also imposed specific and increasingly rigorous requirements for Part D SIPs, depending on the area's nonattainment classification, with new deadlines, ranging from immediately to six years, for submitting various components of the plans to EPA. 42 U.S.C. 7511a, 7512a (Supp. II 1990).

Among those requirements are provisions that Congress designed exclusively for the Los Angeles area, which is the only area in the country that is classified as "extreme" for ozone.[4] California must submit by November

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[4] See Section 181(a), 42 U.S.C. 7511(a) (Supp. II 1990); 40 C.F.R. 81.300 *et seq.* (1992); 40 C.F.R. 81.305 (1992); 56 Fed. Reg. 56,694, 56,726 (1991).

15, 1994, a demonstration that the South Coast's ozone SIP will achieve attainment by December 31, 2010. 42 U.S.C. 7511a(c)(2) and (e) (Supp. II 1990). A carbon monoxide attainment demonstration for the South Coast must be submitted by November 15, 1992. 42 U.S.C. 7512a(a)(7) and (b)(1) (Supp. II 1990).

In addition, the 1990 Amendments substituted a new version of Section 110(c)(1) for the previous version of that provision. The amended version states that the Administrator "shall promulgate a Federal implementation plan at any time within 2 years after the Administrator * * * disapproves a [SIP] submission in whole or in part." 42 U.S.C. 7410(c)(1)(B) (Supp. II 1990). EPA's FIP obligation also arises where the Administrator finds that a State has failed to make a "required submission" or that the plan or plan revision submitted by a State does not meet the new requirements for plan submissions established under 42 U.S.C. 7410(k)(1)(A). 42 U.S.C. 7410(c)(1)(A) (Supp. II 1990). A State may not, however, pass the planning obligation on to EPA without penalty. If a State fails to make a required submission, or if EPA disapproves a submission, EPA must impose either a cut-off of highway funds or stringent emission reductions on new or modified sources. 42 U.S.C. 7509 (Supp. II 1990).

The new amendments also include a general savings clause stating that "[n]o control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before November 15, 1990, in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990, in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant." 42 U.S.C. 7515 (Supp. II 1990).

4. EPA concluded that the 1990 Amendments' generic savings clause did not preserve its obligation to promulgate FIPs for the South Coast, because the Agency had never agreed to promulgate any specific "control re-

quirements" as part of its agreement to develop FIPs for the area. Moreover, the legislative history of the savings clause indicated that Congress did not intend EPA to finalize FIPs for the Los Angeles area. Additionally, the language of revised Section 110(c)(1) and of the new Part D provisions, which direct States to develop SIPs meeting new requirements and deadlines and to submit the various SIP components to EPA on specific schedules, indicates that EPA's obligation to promulgate FIPs would arise only upon future disapprovals of those newly submitted SIPs. EPA accordingly asked the district court to vacate the settlement agreement.

The district court agreed with EPA. App., *infra*, 35a-43a. The court found the language of Section 110(c) to be ambiguous, and concluded that EPA's construction is consistent with the structure of the revised Act and the "obvious policy that the States are encouraged to take the lead, with the potential FIP to be the stick that drives them." App., *infra*, 38a. Accordingly, the court found EPA's interpretation entitled to substantial deference. The court also found that the language and history of the savings clause support EPA's interpretation.

5. A divided panel of the Ninth Circuit reversed. App., *infra*, 1a-34a. Although the majority recognized that Section 110(c)(1) had been revised in several particulars by the 1990 Amendments, it held that the "plain" language of amended Section 110(c)(1)(B), which requires EPA to promulgate a FIP within two years after it "disapproves" a SIP, applies to pre-Amendment disapprovals. App., *infra*, 12a-13a. Thus, the court ruled that new Section 110(c)(1)(B) operates retroactively to retain EPA's preexisting FIP obligation, even though the statutory provisions forming the basis for that obligation have been repealed. In reaching this conclusion, the court declined to indicate whether the requirements of the old law or the 1990 Amendments would govern the contents of this FIP. App., *infra*, 13a.

The majority recognized that the States have new SIP obligations under the 1990 Amendments, but it reasoned that no "anomaly" would result from requiring EPA to impose a FIP before a State has had an opportunity to address the new criteria, because the State could propose "new measures as revisions to the FIP." App., *infra*, 13a-14a. Thus, the court concluded that interpreting the amended Act to preserve EPA's obligation to promulgate a FIP "will not have the effect of preempting state planning or the new state submissions that are required under the 1990 Amendments." *Id.* at 19a.

Having found the language of Section 110(c)(1) to be unambiguous, the majority refused to defer to EPA's interpretation of the statutory provisions. App., *infra*, 20a. Moreover, the majority indicated that deference would not be due in any event, because the Agency's construction contradicted views stated in a letter from the EPA Administrator to the House of Representatives written six months before the 1990 Amendments were finally enacted. *Id.* at 20a-21a. The majority also declined to give weight to the language and legislative history of the savings clause, 42 U.S.C. 7515. *Id.* at 16a-20a.[5]

Judge Noonan dissented. He pointed out that Section 110(c) has been significantly revised by the 1990 Amendments and that its language is most logically read to refer to future disapprovals of SIPs, not past disapprovals. App., *infra*, 26a-29a. He also stressed that the SIP disapprovals in this case had been based on provisions of the 1970 and 1977 Acts that have been repealed by the 1990 Amendments, and observed that "[i]t would * * * make nonsense of the new law to hold that the old

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[5] This history included a statement by the chairman of the conference committee indicating that "[w]e do not intend that this savings clause requires EPA to finalize the Federal Implementation Plan in California and preempt the states and regional air quality planning that is ongoing in the Los Angeles area and will otherwise be required under this legislation." 136 Cong. Rec. S16,970 (daily ed. Oct. 27, 1990).

disapproval must continue in effect despite the relaxation of the standards effected by the 1990 changes." App., *infra*, 31a. He also stated that imposing a federal plan at this point, in the absence of any showing of a violation of current requirements, reverses the Act's express preference for granting States the initial role in controlling air pollution. *Id.* at 31a-32a.

REASONS FOR GRANTING THE PETITION

This case presents questions of exceptional practical importance concerning the division of responsibilities between the States and the federal government under the Clean Air Act, the proper interpretation of the Clean Air Act Amendments of 1990, and the proper role of a reviewing court in interpreting important new statutory provisions. The court of appeals' decision reflects a misapplication of this Court's precedents governing statutory construction and deference to agency interpretations. It thereby significantly undermines the federal-state balance embodied in the Act, dramatically alters the manner of implementation Congress has chosen for the new Amendments, and wholly ignores the statutory context in which the Act's air quality goals are to be achieved. As a practical matter, the court of appeals' decision threatens to result in widespread inconvenience and hardship for millions of California citizens and substantial dislocation of California's economy. Those serious consequences, which are contrary both to Congress's express intention and to EPA's reasonable interpretation of the Amendments, should not be visited upon millions of persons without review by this Court of the legal disagreement that has been manifested by the various federal judges who have considered the matter.

The Clean Air Act Amendments of 1990 represent a legislative compromise between Congress's desire for cleaner air and its concern for ensuring future economic growth and well being. In the 1990 Amendments, Con-

gress made a very clear policy choice—to favor state and local planning, followed by federal planning only after the state and local planning is found deficient—and prescribed the precise timing and manner in which air quality standards in each region should be achieved by the responsible state and local authorities. The panel's decision turned that policy choice on its head by misconstruing and ignoring the statutory context of the Act's provisions on state and federal plans. The majority opinion preserves EPA's pre-1990 obligation to promulgate a FIP for the Los Angeles area merely because California's pre-1990 SIPs failed to comply with certain requirements of the pre-1990 Act, requirements that Congress *eliminated* in the 1990 Amendments.[6]

As a result of the lower court's decision, EPA has been made initially and primarily responsible for developing air pollution control strategies for a large part of California, and has been precluded from giving the state and local authorities their rightful opportunity to make the first attempt to assemble the mix of pollution controls they believe are appropriate to achieve the huge emission reductions necessary—an opportunity they would otherwise have under the 1990 Amendments.[7] In distorting

[6] Specifically, California failed to submit a plan showing attainment of the ozone and carbon monoxide standards by 1987, a requirement based on Section 172(a) of the pre-1990 Act. In the 1990 Amendments, Congress deleted this deadline from Section 172(a) and replaced it with new provisions that do not preserve any element of the State's prior failures.

[7] The result here also governs EPA's FIP obligations in two other areas of California as well: Sacramento and Ventura County. In *Environmental Council of Sacramento* v. *EPA*, Civ. No. S-87-420 EJG (E.D. Cal. Dec. 2, 1991), aff'd, No. 92-15293 (9th Cir. July 9, 1992), EPA moved to vacate a settlement agreement requiring it to promulgate an ozone FIP for the Sacramento area. After the district court denied EPA's motion, the parties negotiated a modification to the settlement agreement whereby EPA agreed to publish a proposed FIP within four months of the entry of the mandate

the statutory language and structure to achieve this reversal of the state and federal planning roles under the Act, the court of appeals also misapplied well-established principles concerning statutory construction and deference to agency interpretation. See *Arkansas* v. *Oklahoma*, 112 S. Ct. 1046, 1060-1061 (1992); *Rust* v. *Sullivan*, 111 S. Ct. 1759, 1769 (1991).

The practical consequences of the panel's errors are enormous. The Los Angeles area has the worst air quality in the nation. Any plan to attack and solve the area's "extreme" ozone problem necessarily will have pervasive deleterious impacts on most aspects of that region's economy—an economy that each year produces goods and services valued at more than a quarter of a *trillion* dollars—and on the lives of the thirteen million people living there.[8] The only type of complete regulatory plan that EPA has the means to promulgate and implement in the area would necessarily consist of a limited number of intrusive measures that would indiscriminately force huge cutbacks in emissions from most mobile, stationary, and area sources. As we explain below, extreme measures such as gas rationing and "no drive" days are the types of limited tools with which EPA must work.

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by the Ninth Circuit in the instant case, and a final FIP six months thereafter. EPA appealed the judgment in the *Sacramento* case, and the parties agreed to submit that appeal to the panel which was already considering the instant case. That panel affirmed the *Sacramento* judgment in a brief order dated July 9, 1992, which cited its July 1, 1992 decision in the instant case. Judge Noonan again dissented. We are filing a petition for a writ of certiorari in that case concurrently with the filing of this petition.

Under an agreement in a parallel case involving EPA's obligation in Ventura County, *Citizens to Preserve the Ojai* v. *EPA*, No. CV 88 00982 HLH (C.D. Cal. Mar. 13, 1991), EPA's obligation to promulgate a FIP is also governed by the result here.

[8] In addition, the two million residents and the economies of the Sacramento and Ventura County areas—regions with a combined annual domestic product in excess of 40 billion dollars—will be similarly affected.

By contrast, the state and local authorities have available the authority and resources to formulate, adopt, and implement a much more nuanced plan containing many measures that EPA lacks the authority or the practical ability to implement (such as local land-use planning, public transportation, and traffic control measures). Thus, if EPA is forced to promulgate a FIP before the State has had its chance to produce a SIP satisfying the requirements of the 1990 Amendments, the result will be to require the residents and businesses of the affected areas to take actions that may be either unnecessary under, or even incompatible with, the measures that the state and local authorities will ultimately require. This, in turn, will cause widespread confusion and economic waste for an indeterminate period of time, and is likely to impede attainment of the air-quality goals set by Congress.

This disruption could be avoided entirely if, as the statute requires, the State were given the initial opportunity to formulate its plan under the 1990 Amendments, and EPA were only then called on to produce a FIP if necessary to fill gaps in areas in which the State had failed to satisfy fully its obligations under the Act. Reversing the court of appeals' misconstruction of the statute and avoiding the disruption that would result from the panel's decision are matters of such importance to faithful implementation of the congressional plan that this Court's review is warranted.

1. The majority's ruling conflicts with fundamental principles concerning the proper interpretation of statutory provisions.

a. The critical language here, found in Section 110(c)(1)(B), states that the Administrator "shall promulgate a Federal implementation plan at any time within 2 years after the Administrator * * * *disapproves* a State implementation plan submission in whole or in part." 42 U.S.C. 7410(c)(1)(B) (Supp. II 1990) (emphasis added). The fact that this directive is phrased in

the present tense is strong evidence that Congress did not intend the obligation to apply retroactively to past disapprovals.

The court of appeals nonetheless applied Section 110(c)(1) to EPA's past disapproval of the State's SIP, noting that "[t]he present tense is commonly used to refer to past, present, and future all at the same time." App., *infra*, 11a. Contrary to the majority's approach, however, this Court recently has emphasized that "Congress' use of a verb tense is significant in construing statutes." *United States* v. *Wilson*, 112 S. Ct. 1351, 1354 (1992). See *Gwaltney of Smithfield, Inc.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987). Congress could easily have said "has disapproved" if it had meant pre-Amendment disapprovals to trigger the duty to impose FIPs.

b. EPA's reading of the Act is further reinforced by the fact that the 1990 version of Section 110(c)(1) gives EPA two years (rather than the six or eight months available under the previous version of the provision) in which to develop a FIP. Congress obviously concluded that this additional time was necessary for the complex task of completing a FIP. Yet under the majority's retroactive application of the 1990 Amendments, the two-year period established by the new Section 110(c)(1) began to run when EPA disapproved the State's SIP in 1988. As a result, the two-year period established by Congress in November 1990 ran out in January 1990—ten months before the 1990 Amendments were even enacted. In short, even though Congress clearly intended to *increase* the amount of time available for promulgating FIPs, the majority applied the amended statute retroactively in order to reduce the time for producing a FIP to zero, with the bizarre result that Congress must be deemed to have imposed a statutory deadline on EPA that the Agency had already violated before the deadline even came into existence.

c. There is still another indication in the language of revised Section 110(c)(1) that the obligation to promulgate a FIP was not intended to apply retroactively to pre-1990 SIP disapprovals. The 1990 Amendments substantially rewrote Section 110(c)(1) by adding a new triggering event in Section 110(c)(1)(A): EPA's finding that a submission fails to meet the "minimum criteria" which are to be established by EPA pursuant to new Section 110(k)(1)(A). 42 U.S.C. 7410(c)(1)(A) (Supp. II 1990). "Minimum criteria" did not exist before passage of the 1990 Amendments, and thus an obligation to promulgate a FIP by virtue of a State's failure to meet those criteria could not possibly have come into existence until after enactment of the Amendments. While it is theoretically possible that Congress could have intended that one clause of Section 110(c)(1) would be retroactive in effect while the other clause of that same Section was exclusively forward-looking, one would certainly expect that the language used would reflect that fundamental difference in approach. But subsection 110(c)(1)(B) uses "disapproves" rather than "has disapproved" in reference to the SIP, which rebuts any notion that Congress meant this one clause to look backward to pre-Amendment disapprovals.

2. a. In addition to its failure to adhere to the language and structure of amended Section 110(c)(1) itself, the court of appeals also failed to heed the rule that "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King* v. *St. Vincent's Hospital*, 112 S. Ct. 570, 574 (1991) (citations omitted). See *Crandon* v. *United States*, 494 U.S. 152, 158 (1990). When the 1990 Amendments are read as a whole, it becomes apparent that Congress plainly intended state and local authorities to be given the first chance to devise SIPs to comply with the requirements of the amended Act.

Congress completely revised the Act's requirements for nonattainment areas such as the South Coast in the 1990

Amendments. Most importantly for purposes of this case, Congress repealed the pre-1990 provision requiring States to attain the Act's ozone and carbon monoxide standards by 1987.[9] Instead, Congress developed a graduated series of requirements for different areas depending on the severity of the air quality problem in each. Because of the unique difficulties in bringing about attainment of air quality standards in the South Coast area, Congress included special provisions that apply to that area alone. As the only "extreme" ozone nonattainment area in the country, the South Coast is the only area that has been given 20 years in which to attain the ozone standard, and the only area permitted to rely in part on anticipated new control technologies to reach attainment. 42 U.S.C. 7511(a)(1), 7511a(e)(5) (Supp. II 1990). At the same time, the 1990 Amendments impose specific new requirements for the South Coast ozone and carbon monoxide SIPs, and impose new deadlines for submitting those plans to EPA. Sections 171-193, 42 U.S.C. 7501-7515 (Supp. II 1990).

This greatly altered legal regime highlights the illogic of the majority's ruling. A FIP is defined by the amended Act as a plan to fill a gap or "correct all or a portion of an *inadequacy* in a State implementation plan." 42 U.S.C. 7602(y) (Supp. II 1990) (emphasis added). California's 1982 SIP for the South Coast area was rejected by EPA in 1988 because it was "inadequa[te]" when measured by the pre-Amendment deadlines, and accordingly EPA had an obligation under the pre-1990 Act to promulgate a FIP in order to correct that "inadequacy." But it stretches the statutory language beyond the breaking point to say that California's compliance with the Act is "inadequa[te]" today in light of the amended stat-

[9] It was California's failure to comply with that now-repealed provision that led to EPA's original rejection of the SIP for the South Coast area and thus to EPA's pre-1990 obligation to promulgate a FIP.

ute, because the State has not even been given a chance to demonstrate its ability to comply with the new deadlines and requirements imposed by the 1990 Amendments and has not yet failed to meet any of those deadlines.

b. In the unlikely event that Congress had wanted the 1990 Amendments to preserve EPA's obligation to prepare a FIP in cases where a SIP had run afoul of the old deadlines, it presumably would have made this intent clear in the general savings clause of the 1990 Amendments, 42 U.S.C. 7515. The language of that clause, however, strongly cuts against any such purported intent. The relevant language preserves only any "control requirement" that was in effect "or required to be adopted by an order, settlement agreement, or plan in effect before November 15, 1990." Such a control requirement can be modified only if the modification "insures equivalent or greater emission reductions." 42 U.S.C. 7515. While the settlement agreement in this case required EPA to promulgate a FIP on a defined schedule, a FIP is merely a plan, not a "control requirement." [10] If Congress had intended to preserve EPA's obligation to promulgate substitute federal plans, as opposed to "control requirements," it presumably would have said so explicitly in the savings clause.

As the dissent points out (App., *infra*, 33a), the savings clause also preserved all regulations in effect before the date of the Amendments. For this reason, FIPs promulgated in final form before the Amendments were enacted remain in effect. The settlement agreement obligating EPA to promulgate a FIP was not promulgated as a regulation (or a control requirement), however, and

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[10] The second sentence of the savings clause provides that "[n]o control requirement * * * required to be adopted by an order, settlement agreement, or plan in effect" may be modified. 42 U.S.C. 7515. The fact that Congress used the words "control requirement" and "plan" for different purposes within the same sentence of the savings clause is compelling evidence that it intended to give the words different meanings.

hence was not preserved by the savings clause. The majority's insistence (App., *infra*, 14a n.8) that preserving an obligation to prepare a FIP is the same as preserving a promulgated FIP itself ignores the plain language of the savings clause.

c. The majority's conclusion that a FIP is required now, before the State has even had an opportunity to develop the required submissions under the amended Act, violates the express congressional determination that "air pollution prevention" and "air pollution control at its source is the primary responsibility of States and local governments." Section 101(a)(3), 42 U.S.C. 7401(a)(3) (Supp. II 1990). This policy statement cannot be dismissed as mere precatory guidance; it goes to the heart of how the Act was intended to work. This policy counsels strongly against any reading of the Act that would require EPA to promulgate a FIP before the State has had an opportunity to determine for itself how best to control pollution under the greatly revised requirements of the 1990 Amendments.

The majority concluded that this strong statement regarding the primacy of state and local efforts was essentially canceled out by the immediately following statement regarding the importance of "Federal financial assistance and leadership." App., *infra*, 15a n.9 (quoting 42 U.S.C. 7401(a)(4)). But that statutory recognition of the federal government's obligation to provide financing and leadership in no way undercuts Congress's fundamental policy decision that the States should have the primary responsibility for air pollution control within their borders. The Act provides for the federal government to take the lead in promulgating certain nationally applicable regulations, such as the motor vehicle and fuels regulations mandated by Title II of the Act. 42 U.S.C. 7521 *et seq.* Beyond that, however, direct federal controls on pollution are the exception rather than the rule. See *Train* v. *NRDC*, 421 U.S. 60, 79 (1975) ("[EPA is]

plainly * * * relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met."); *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 267 (1976) ("[T]he State has virtually absolute power in allocating emission limitations so long as the national standards are met"). While it is undeniable that the federal government has an additional role where a State has failed to produce an adequate SIP, there is no warrant in the statute for continuing federal primacy once Congress amends the statute in a way that essentially moots the State's original failure.

3. Even if we assume, arguendo, that the language and structure of the revised Act were unclear, the proper response would be to defer to EPA's construction, as long as that construction was reasonable. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984); *National Railroad Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1401 (1992). The majority rejected the applicability of the *Chevron* rule because, in its view, the statute was clear. App., *infra*, 20a. But Congress's use of the present tense in the critical phrase of the statute, combined with the repeal of the provisions that had formed the basis for EPA's prior state plan disapprovals, indicates that Congress was referring to future disapprovals under the amended Act, not to prior disapprovals under the pre-1990 Act. At the very least, this is not a question that admits of only one reasonable answer. See *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1016 (1992) (a statute is not "unambiguous" if its language admits of two plausible readings).

Judicial deference to reasonable agency interpretations of statutes they administer is a "well settled principle of federal law." *National Railroad Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. at 1401. Despite the

fact that EPA's construction is consistent with the language, history, and structure of the 1990 Amendments, the court of appeals refused to defer to that construction because the Agency had allegedly offered a contradictory interpretation in the past. App., *infra*, 20a. The court cited a letter written by the EPA Administrator six months before passage of the amendments in which he criticized the House version of the statute for generally retaining the FIP requirement as a nondiscretionary duty. The letter stated that the House version would thereby preserve "current FIP obligations." See App., *infra*, 19a (quoting 136 Cong. Rec. H2771, H2887 (daily ed. May 23, 1990)). This statement, made as the dissent points out "in the course of legislative bargaining" (App., *infra*, 24a), should not be taken as EPA's contemporaneous interpretation of the Act itself.

Almost immediately after enactment of the 1990 Amendments, EPA set forth its official interpretation of Section 110(c)(1), based on a reading of the entire statute (including the savings clause). 56 Fed. Reg. 826 (1991). In that notice, EPA stated its formal interpretation that FIP obligations based on pre-1990 SIP disapprovals did *not* survive the Amendments. This, rather than a letter written during the early stages of the legislative debate, constitutes the contemporaneous agency interpretation of the Amendments. See *Russello* v. *United States*, 464 U.S. 16, 29 (1983). The majority's refusal to give any deference to that agency interpretation was error. See *Rust* v. *Sullivan*, 111 S. Ct. at 1769.

To be sure, the language of Section 110(c) referred to in the Administrator's letter was unchanged in the bill as finally enacted, but the post-letter legislative history of the savings clause clarifies that Congress itself did not interpret the 1990 Amendments to require EPA to promulgate such FIPs. Senator Baucus, Chairman of the Conference Committee on the 1990 Amendments, inserted in the Congressional Record a statement, entitled "Clean

Air Conference Report," intended as "an explanation that is much more detailed than the statutory language." 136 Cong. Rec. S16,969 (daily ed. Oct. 27, 1990). The statement indicated that the savings clause is an anti-backsliding provision and that "[w]e do not intend that this savings clause requires EPA to finalize the Federal Implementation Plan in California and preempt the states and regional air quality planning that is ongoing in the Los Angeles area and will otherwise be required under this legislation." *Id.* at S16,970. The ranking minority member of the Conference Committee confirmed this intention in a colloquy with then-Senator Wilson of California. See 136 Cong. Rec. S17,237 (daily ed. Oct. 27, 1990). Those statements thus specifically addressed the ultimate question raised in the Administrator's letter on which the court of appeals relied.

The court of appeals simply dismissed these indications of legislative intent as the statements of individual legislators entitled to no weight, even though these statements are consistent with the anti-backsliding language of the savings clause. But it is well settled that the statements of individual legislators are entitled to consideration in some instances, particularly where the individuals at issue are those whose explanations are likely to have been viewed as authoritative by the members of the legislative body that enacted the legislation. See, *e.g.*, *National Ass'n of Greeting Card Publishers* v. *United States Postal Serv.*, 462 U.S. 810, 832 n.28 (1983) (statements of conference committee members are "certainly significant," and conference committee reports are "due great weight"); *North Haven Bd. of Education* v. *Bell*, 456 U.S. 512, 526-527 (1982). Here, the chairman and senior minority member of the conference committee made statements squarely supportive of EPA's post-adoption interpretation of the Amendments, and at the very least EPA was entitled to rely on those statements in determining the meaning of the Act as finally adopted. The court of

appeals accordingly erred in rejecting EPA's reasonable interpretation of the 1990 Amendments in favor of its own strained interpretation of the statute.

4. The court of appeals' decision, if allowed to stand, will likely inflict substantial hardship on the citizens and businesses of large segments of the Nation's most populous State. Those areas will suffer more adverse impacts and disruption from EPA's implementation of a FIP than would result from implementation of SIPs designed to achieve the same air quality goals, because EPA does not have the same range of control and enforcement tools available to the State.

The Los Angeles area, despite having the most stringent air pollution controls in the nation, still suffers from the Nation's worst air quality problem. See generally 53 Fed. Reg. 49,494 (1988); 55 Fed. Reg. 36,458 (1990). Any plan to attain the ozone standard there will demand a reduction in ozone-precursor emissions of more than 80 percent even after application of current stringent local regulations. 53 Fed. Reg. 49,495, 49,502 (1988); 55 Fed. Reg. 36,460 (1990); Declaration of David P. Howekamp ¶ 6 (attached to Appellees' Motion To Stay The Issuance Of The Mandate). Attainment will require substantial emission reduction contributions from nearly every sector of the Los Angeles area economy. For instance, controls will be necessary on thousands of industrial sources, including such heavily regulated sources as refineries, utilities, and aerospace facilities, as well as printers, commercial bakeries, electronics firms, and small businesses. Attainment will also demand severe cutbacks in vehicle emissions, perhaps through a combination of forced technological advances and reduced vehicle use. *Id.* at ¶¶ 6, 7, and 8. Beyond that, any attainment plan for the area will require emissions reductions from such nontraditional sources as airport operations, locomotives, marine vessels, recreational vehicles and boats, agricultural equipment and consumer products. *Id.* at ¶¶ 7, 8.

Because the South Coast is classified as an "extreme" ozone area, Congress granted the State until November 15, 1994, to submit major portions of the area's new SIP, and created a unique set of planning requirements applicable only to the South Coast area. 42 U.S.C. 7511 (c)(2) and (e) (Supp. II 1990). If EPA were forced to develop and implement a FIP, not only would the timing of the plan's adoption be altered, but the content of the regulations themselves would differ drastically from the content of a state-adopted plan.

Moreover, an EPA FIP would inflict far more economic and social dislocation on California than would a SIP. There is a vast arsenal of approaches available to state and local governments, but effectively foreclosed to EPA, that can mitigate the disruptive effects of stringent regulation. Local authorities have at their disposal a range of techniques that federal regulators could not legally or feasibly implement and hence that could not be a part of a federal plan.[11] Local authorities can, for example, construct high occupancy vehicle lanes, expand mass transit service, provide carpooling incentives, incorporate air pollution control elements into comprehensive land use and development plans, synchronize traffic signals, meter freeway access ramps, establish one-way streets, provide telecommuting incentives, and maintain automated highway control systems—all designed to reduce motor vehicle emissions.

By contrast, because of EPA's limited ability and resources to implement and enforce measures tailored to local circumstances, it would likely be necessary for an EPA plan to reduce emissions from motor vehicles by

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[11] Section 110(a)(2)(E)(i) of the Act requires the plan to include necessary assurances that the State will have "adequate personnel, funding, and authority * * * to carry out such implementation plan." 42 U.S.C. 7410(a)(2)(E)(i) (Supp. II 1990). Any FIP would need to meet the same requirement. Section 302(y), 42 U.S.C. 7602(y) (Supp. II 1990).

prohibiting or restricting vehicle use through a smaller set of simplistic and extreme measures such as gas rationing, no-drive days, limits on vehicle registration, and bans on high-emitting vehicles. Similarly, a FIP necessarily would rely on a few crude but sweeping measures to force huge cutbacks in solvent use (which is partly responsible for ozone-precursor emissions) and use of other polluting chemicals by industry and other sources.

The history of FIP regulation in the South Coast demonstrates the important practical differences between SIPs and FIPs. In the 1970s, EPA's attempts to formulate a FIP to correct the South Coast's failure to meet the requirements of the 1970 Act relied heavily on massive gas rationing to achieve compliance with the Act. Fiercely negative public reaction led EPA to rescind the plan on the eve of passage of the 1977 Amendments. 41 Fed. Reg. 45,565 (1976); see also 53 Fed. Reg. 49,494, 49,497-49,498 (1988). The committee reports accompanying the 1977 bills to amend the Act recognized the relative crudeness of the FIP that EPA had promulgated in response to state failures under the 1970 Act. See H.R. Rep. No. 294, 95th Cong., 1st Sess. 286-288 (1977), *reprinted in* 4 *Leg. Hist.* 2753-2755 (reviewing EPA's intrusive FIPs of the 1970s and stating that "as a practical matter State and local governments are in a better position than EPA to resolve those pollution problems, which involve millions of motor vehicles"); S. Rep. No. 127, 95th Cong., 1st Sess. 10 (1977), *reprinted in* 3 *Leg. Hist.* 1384 ("The Federal Government does not have the resources to do an effective job of running the air pollution control programs of the State.").

The FIP that EPA proposed just before enactment of the 1990 Amendments further reveals how markedly a South Coast SIP would differ from a FIP for the area. That FIP proposal contrasted the 139 control measures then under careful development by the state and local authorities with the handful of pervasive measures EPA

was including in its proposed FIP. 55 Fed. Reg. 36,470, 36,501 (1990). While the State had not yet adopted most of the measures discussed in the FIP proposal, the blueprint for the State's program listed a vast array of detailed control options that State and local authorities planned to include in a properly developed plan. *Id.* at 36,479-36,484. By contrast, EPA's limited ability to implement many of the measures on the local authorities' list—for instance, the transit improvements and commuter provisions in the South Coast's "Measure 2," *id.* at 36,486-36,487—forced the Agency to limit its proposed FIP to a relative handful of crude measures. *Id.* at 36,501.[12]

The likely result of the decision below, therefore, is that EPA and the State will be formulating very different attainment plans simultaneously over the next few years. Even if the State fulfills its obligation to submit an attainment demonstration in 1994, this merely sets in motion a process lasting until at least 1996 for EPA to review the State's SIP and approve or disapprove it under the applicable requirements. Section 110(k)(1), 42 U.S.C. 7410(k)(1) (Supp. II 1990). In the meantime, as long as EPA's FIP is in effect, sources will need to take steps toward compliance with it, even though the State will be preparing a plan that may make quite different demands on those sources. Because of the uncertainty as to which plans or portions will actually be implemented, the regulated community will suffer substantial confusion in its attempts to make the necessary preparations required to comply.[13]

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[12] Due to the harshness of these measures, EPA proposed in the alternative a FIP composed almost entirely of commitments to formulate FIP measures in the future. 55 Fed. Reg. 36,532-36,533 (1990). The Agency noted, however, that it was "unclear whether a committal FIP for the [South Coast area] would be consistent with the statute." *Id.* at 36,503.

[13] This contrasts with the far narrower scope and negligible impact of the FIPs that EPA was required to promulgate for two

Thus, the court of appeals' decision is likely to cause substantial disruption of economic planning and air quality control in the Los Angeles basin over the next several years. Similar disruption would likely occur in the other California areas directly affected by the panel's decision.[14] Avoiding that disruption and assuring proper implementation of the new statutory scheme enacted by Congress is a matter of such exceptional importance that this Court should review the decision below.

We recognize that the particular legal question presented in this case is of limited scope and of a nonrecurring nature. In light of the potentially severe practical consequences of the decision below, however, we believe that review is warranted. Moreover, in view of the clarity of the pertinent statutory material and the mani-

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Arizona areas pursuant to the court order in *Delaney* v. *EPA*, 898 F.2d 687 (9th Cir.), cert. denied *sub nom. Reilly* v. *Delaney*, 111 S. Ct. 556 (1990). In those areas, EPA was able to write a plan to solve the air quality problem by developing a few moderate, carefully tailored, implementable measures. See 56 Fed. Reg. 5458 (1991). Arizona had already developed and implemented numerous control measures designed to bring the areas—Tucson and Phoenix—into attainment. As a result of Arizona's successful implementation of its measures, by the time EPA was called upon to promulgate a FIP, the Tucson area was already in attainment, and the Phoenix area was on the brink of attainment. Thus, EPA in its FIP for Tucson did not have to adopt any new control measures, and in its FIP for Phoenix needed merely to strengthen two measures previously adopted by Arizona—an oxygenated gasoline program and a gasoline volatility control program. Moreover, before these federal measures could even take effect, Arizona passed legislation mandating equivalent measures. EPA then approved those measures in lieu of the measures contained in its FIP. 57 Fed. Reg. 8268 (1992).

[14] The federal plan for Sacramento, one of the other affected areas, would be similarly intrusive, since attainment of the ozone standard there might require even greater emission reductions from mobile sources, and would have to be implemented on a shorter attainment schedule.

fest error of the divided Ninth Circuit, the Court may wish to consider summary reversal.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court may wish to consider summary reversal.

Respectfully submitted.

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NOVEMBER 1992

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91-55634

D.C. No. CV-88-4414-HLH

COALITION FOR CLEAN AIR; SIERRA CLUB, INC., PLAINTIFFS-APPELLANTS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DEFENDANT-APPELLEE

v.

SOUTHERN CALIFORNIA EDISON COMPANY, PLAINTIFF-INTERVENOR-APPELLEE

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Argued and Submitted April 10, 1992*
Pasadena, California

Filed July 1, 1992

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* The panel unanimously finds Case No. 91-55634 suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

Before: Alfred T. Goodwin, William A. Norris, and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Norris; Dissent by Judge Noonan

OPINION

NORRIS, Circuit Judge:

California's South Coast Air Basin has the dirtiest air in the United States.[1] Twenty-two years have passed since Congress first enacted legislation requiring implementation plans to attain national air quality standards, and yet today the South Coast still lacks implementation plans for ozone and carbon monoxide. In 1989, EPA entered into a settlement agreement with appellants requiring it to perform its statutory duty and promulgate federal implementation plans for the South Coast on an expeditious schedule. EPA now argues that, when Congress passed the Clean Air Act Amendments of 1990, it relieved EPA of this obligation and returned the implementation plan process to square one. We disagree and reverse the district court's decision vacating the settlement agreement and dismissing the case. *Coalition for Clean Air v. EPA*, 762 F. Supp. 1399 (C.D. Cal. 1991). We remand to the district court for reinstatement of the agreement and direct the

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[1] The South Coast Air Basin covers much of Southern California including Orange County and the non-desert portions of Los Angeles, Riverside, and San Bernadino Counties. It has by far the worst ozone and nitrogen dioxide levels in the United States and arguably the worst carbon monoxide level of any urbanized area in the United States. 55 Fed. Reg. 36,458, 36,464 (1990).

court to establish an expeditious schedule for EPA to promulgate final implementation plans for the South Coast.

I

The Clean Air Act was passed in 1963, but it was the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970), that gave the Clean Air Act the basic structure it retains today. *See generally Train v. NRDC*, 421 U.S. 60, 63-64 (1975) (discussing pre-1970 statutes). The 1970 Amendments created "a federal-state partnership for the control of air pollution." *Abramowitz v. EPA*, 832 F.2d 1071, 1073 (9th Cir. 1987). Section 109 of the Act, as amended, directed EPA to establish National Ambient Air Quality Standards ("NAAQS") for any air pollutants that might endanger public health or welfare. Clean Air Act ("CAA") § 109, 84 Stat. at 1679-80. EPA issued NAAQS for six pollutants in 1971, including carbon monoxide ("CO") and ozone.[2] Responsibility for meeting these standards fell, in the first instance, to the states, which were required to submit State Implementation Plans ("SIPs") by 1972 that would provide for attainment of the NAAQS by 1975. CAA § 110(a)(1), 84 Stat. at 1680. EPA was required to review the SIPs and to disapprove any that failed to meet the requirements of the Act, including the attainment of NAAQS by the statutory deadline. CAA § 110(a)(2), 84 Stat. at 1680-81. If EPA disapproved a SIP, the 1970 Amendments required that EPA adopt a Federal

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[2] The other four pollutants were particulate matter, sulfur dioxide, nitrogen oxides, and hydrocarbons. Lead was added to the list in 1978 and hydrocarbons were removed in 1983. *See Abramowitz*, 832 F.2d at 1073.

Implementation Plan ("FIP") that would meet the requirements of the Act and take the place of the disapproved SIP. CAA § 110(c), 84 Stat. at 1681-82.

In February 1972, California submitted a SIP for the South Coast to EPA. On May 31, 1972, EPA announced its disapproval of major portions of the SIP. 37 Fed. Reg. 10,842, 10,851-10,855 (1972). At that point, EPA was statutorily required to adopt a FIP for the South Coast but failed to act. As the result of a citizens' suit, EPA was placed under a court order to prepare a FIP by January 15, 1973 that would provide for attainment of NAAQS no later than 1977. *Riverside v. Ruckelshaus*, Civ. No. 72-2122-H, 4 Envt'l Rep. Cas. (BNA) 1728, 1731 (C.D. Cal. Nov. 16, 1972). During 1973, EPA issued several proposed FIPs that contained extreme provisions including gas rationing. *See, e.g.*, 38 Fed. Reg. 2194, 2194-2200 (1973); 38 Fed. Reg. 31,232, 31,232-31,255 (1973). On October 15, 1976, EPA revoked its proposed gas rationing regulations, which were due to take effect in 1977, because of "the seriously disruptive social and economic consequences of such regulations," in spite of the fact that the revocation would "render the affected [implementation plans] defective as a legal matter, since such [plans] will no longer contain regulations which provide for NAAQS attainment." 41 Fed. Reg. 45,565 (1976).

Faced with widespread failure by the states to attain NAAQS, Congress amended the Clean Air Act again in 1977, to give "nonattainment" areas more time. Pub. L. No. 95-95, 91 Stat. 685 (1977). The deadline for NAAQS attainment was extended to 1982. CAA § 172, 91 Stat. at 746-48. On July 25, 1979, California submitted a SIP for the South Coast Air Basin requesting an extension of the ozone and

CO attainment dates to 1987. EPA proposed to disapprove the SIP because California had failed to adopt a motor vehicle inspection and maintenance program, which was required as a condition for granting such an extension. 45 Fed. Reg. 21,271, 21,271-21,282 (1980). EPA took final action disapproving the SIPs for ozone and CO on January 21, 1981. 46 Fed. Reg. 5965, 5975 (1981).

In 1982, California submitted extensive revisions to its proposed South Coast SIPs for ozone and CO. These 1982 proposed SIPs acknowledged that even if the plans were fully implemented, the South Coast would fail to attain the ozone and CO NAAQS by 1987. 48 Fed. Reg. 5074, 5082-5083 (1983). On February 3, 1983, EPA proposed to disapprove the 1982 SIPs. *Id.* at 5074. California submitted further revisions, and EPA took final action on July 30, 1984, approving the CO and ozone control measures without requiring any demonstration that those measures would achieve attainment by the statutory deadline. EPA simply noted that it was deferring any final approval or disapproval of the SIP's attainment provisions. 49 Fed. Reg. 30,300, 30,305 (1984); *see Abramowitz*, 832 F.2d at 1074.

In September 1984, a citizen timely petitioned this court for review of the EPA's 1984 decision. We held that "EPA exceeded its authority under the Clean Air Act by approving the control measures without determining whether those measures would demonstrate attainment by the December 31, 1987 statutory deadline." *Abramowitz*, 832 F.2d at 1072-73. We remanded "with the specific instruction that EPA disapprove the relevant portions of the SIP and face up to implementing the measures which are to be triggered by failure to meet attainment re-

quirements." *Id.* at 1073. In compliance with our order, EPA disapproved the South Coast SIPs for ozone and CO on January 22, 1988, triggering once again EPA's statutory obligation to adopt FIPs for the South Coast Air Basin. 53 Fed. Reg. 1780 (1988).

On February 22, 1988, appellants Coalition for Clean Air and the Sierra Club filed this citizens' suit to enforce EPA's obligation to promulgate ozone and CO FIPs for the South Coast. In March 1989, EPA entered into a settlement agreement with plaintiffs, which obligated it to prepare, propose, and promulgate final FIPs for the South Coast. Because of the 1989 San Francisco earthquake, the district court extended EPA's deadline for publishing the proposed FIPs from April 30 to July 31, 1900. EPA finally published the proposed FIPs on September 5, 1990, and agreed to finalize them by February 28, 1991. 55 Fed. Reg. 36,458, 36,458-36,576 (1990).

In the meantime, EPA sought across-the-board relief from its statutory obligation to promulgate FIPs from Congress, which had begun to consider new amendments to the Clean Air Act. In September 1989, at EPA's urging, the Senate passed an amendment that would have left promulgation of FIPs to EPA's discretion. *See* S. 1630, 101st Cong., 1st Sess., § 105 (1989). In May 1990, a House Committee deleted this language, which prompted a letter from EPA Administrator Reilly complaining that the House action would require promulgation of a FIP imposing "across-the-board, draconian measures devastating the country's largest industrial area," an obvious reference to the South Coast Air Basin. 136 Cong. Rec. H2771, H2887 (daily ed. May 23, 1990). However, Administrator Reilly's complaint went un-

heeded by Congress. The House language retaining EPA's mandatory obligation to promulgate a FIP whenever it disapproves a SIP was ultimately enacted by Congress and signed into law by President Bush on November 15, 1991 as part of the Clean Air Act Amendments of 1990. Pub. L. No. 101-549, 104 Stat. 2399 (1990).

On November 30, 1991, EPA filed a motion asking the district court to vacate the settlement agreement and dismiss the case on the basis of the 1990 Amendments. EPA argued that Congress could not have intended to continue EPA's obligation to promulgate FIPs for the South Coast under the settlement agreement because the 1990 Amendments contained new criteria and new timetables for attainment, which EPA claimed the states must address in the first instance. Under EPA's interpretation of the 1990 Amendments, its mandatory obligation to promulgate FIPs would be triggered only if California failed to submit adequate SIPs under the new deadlines. The earliest date FIPs would be required for the South Coast under this interpretation of the 1990 Amendments is April 15, 1998. The district court granted EPA's motion to vacate the settlement agreement and dismissed the case. This appeal followed.[3]

Appellants make two arguments in support of their position that EPA is currently obligated to promulgate ozone and CO FIPs for the South Coast. First, they argue that § 110(c)(1)(B) of the Clean Air Act, as amended, did not relieve EPA of its obliga-

[3] In a separate action, EPA moved to vacate a settlement agreement requiring it to promulgate a FIP for the Sacramento area. The district court denied EPA's motion on December 2, 1991. *Environmental Council of Sacramento v. EPA*, Civ. No. S-87-420 EJG, (E.D. Cal. Dec. 2, 1991).

tion to promulgate these FIPs. Second, they argue that even if § 110(c)(1) had been amended to relieve EPA of its FIP obligation, the Amendments' Savings Clause—§ 193 of the Clean Air Act—would have preserved EPA's obligation under the settlement agreement. Because we hold that § 110(c)(1)(B) imposes a current obligation on EPA to promulgate ozone and CO FIPs for the South Coast, we do not reach the Savings Clause question.

II

EPA's statutory obligation to promulgate FIPs is contained in § 110(c)(1) of the Clean Air Act, as amended in 1990:

> The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—
>
> > (A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under section 7410(k)(1)(A) of this title, or
> >
> > (B) disapproves a State implementation plan submission in whole or in part,
>
> unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

42 U.S.C. § 7410(c)(1). Appellants contend that under subsection (B), EPA is obligated to promulgate ozone and CO FIPs for South Coast based on its

disapproval in January 1988 of California's proposed SIPs. EPA, on the other hand, contends that § 110 (c) (1), as amended in 1990, was intended to operate prospectively only, so that EPA's obligation to promulgate a FIP for the South Coast will be triggered only if California fails to submit a SIP that meets the requirements of the Clean Air Act by the deadlines set forth in the 1990 Amendments.

A

We begin with the language of the provision: "The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator . . . disapproves a State implementation plan submission in whole or in part." This language is not, by its terms, limited to EPA's disapproval of "newly submitted" SIPs or SIPs "submitted under the 1990 Amendments." Instead it refers to disapproval of state implementations plans generally, either in whole or in part. EPA must promulgate a FIP within two years of such disapproval, unless the state submits and EPA approves revisions to the SIP that correct the deficiency. Since EPA disapproved the South Coast SIPs in January 1988, the statute on its face requires EPA to promulgate FIPs for the South Coast by January 1990.[4]

We recognize that EPA's obligation under § 110 (c) (1) is put in the future tense. However, the time referred to by the word "shall" is two years from any of the triggering events listed in the provision, not

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[4] Under the terms of the pre-1990 Act, EPA had only six months from the date that the original state submission was due in which to promulgate a FIP. 84 Stat. at 1681-82.

two years from enactment of the 1990 Amendments.[5] Triggering event (A) actually includes two separate events: (1) EPA's finding that a state has failed to make a required submission, and (2) EPA's finding that a submission fails to meet the minimum criteria for completeness established under § 7410 (k) (1) (A). Since § 7410(k) (1) (A) was added by the 1990 Amendments, it appears that the second of these findings could only occur after enactment of the 1990 Amendments. However, neither the first of these findings nor triggering event (B)—disapproval of "a State implementation plan submission in whole or in part"—contains any similar temporal limitation. Since these events could occur in the past or in the future, the use of the future tense "shall" to express EPA's obligation does not indicate Congress' intent that § 110(c) (1) operate prospectively only. In other words, if "disapproves" refers to past disapprovals as well as to future ones, "shall" is the appropriate word to describe obligations which may already have been triggered as well as those which may be triggered in the future.

However, EPA argues that the word "disapproves" cannot refer to past disapprovals because it is phrased in the present tense. EPA relies heavily on *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57-59 (1988), in which the Supreme Court interpreted a provision authorizing citizens' suits against persons "alleged to be in violation of" pollution permits as

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[5] Thus, we agree with Judge Noonan that the language of § 110(c) (1) is "future-looking." Dissent at 7755. We disagree, however, that § 110(c) (1) looks to the future from the time of the 1990 Amendments' enactment as opposed to the time of the triggering events listed in § 110(c) (1).

requiring continuous or intermittent violations. However, that case involved more than use of the present tense. It also involved the phrase "in violation," which, coupled with the present tense, suggests a focus on current violations that use of the present tense by itself would not. Moreover, EPA's argument proves too much. As appellants point out, the Clean Air Act, as amended, uses the present tense frequently. For example, Congress uses the present tense to establish criminal liability for "[a]ny person who knowingly—(A) *makes* any false material statement, . . . (B) *fails* to notify or report as required under this Act; . . ." 42 U.S.C. § 7413(c)(2) (emphasis added). Yet clearly the 1990 Amendments do not forgive criminal violations that occurred prior to the Amendments just because Congress speaks in the present tense. The present tense is commonly used to refer to past, present, and future all at the same time. We believe that Congress used the present tense word "disapproves" because it did *not* wish to limit § 110(c)(1)(B)'s reach to either past or future disapprovals.

Unlike Judge Noonan, we attach no weight to the fact that Congress chose to repeal an awkwardly drafted § 110(c)(1) and replace it with a clearer version. *See Dissent* at 7752-53.[6] The new § 110

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[6] Nor, in our view, is it significant that Congress chose to increase the time EPA is given to prepare a FIP to two years and to permit states to correct deficiencies in their SIPs at any time within those two years. *See* Dissent at 7753-54. Both these changes affect what happens *after* EPA's duty to promulgate a FIP has been triggered. Neither one bears on *when* EPA's duty is triggered, which is the critical question in this case.

(c)(1) contains the same triggering events as the old § 110(c)(1).[7] Judge Noonan asserts that subsection (B) of the amended § 110(c)(1) is new, *see* Dissent at 7755, but it is not. The current subsection (B) merely incorporates the old subsection (B), which required promulgation of a FIP when a SIP was determined not to meet the requirements of the Act. *See* 84 Stat. at 1681-82. Judge Noonan also focuses on the fact that the 1990 Amendments added a new triggering event: EPA's finding that a submission fails to meet the minimum criteria for completeness established under § 7410(k)(1)(A). *See* Dissent at 7753. He says there is no reason to ignore subsection (A) in interpreting subsection (B). *Id.* at 7755. The problem with this analysis is that Congress put the word "or" between (A) and (B). Indeed, Congress put the word "or" between the two separate triggering events contained in subsection (A). Clearly Congress intended that EPA's obligation to promulgate a FIP would be triggered by any one of the three triggering events contained in § 110(c)(1) as amended.

In short, the plain language of § 110(c)(1)(B) supports appellants' contention that EPA is currently obligated to promulgate FIPs for the South Coast

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[7] Prior to 1990, § 110(c)(1) contained three triggering events, all of which have been incorporated in the new § 110(c)(1). Old subsection (A) dealt with a State's failure to submit a SIP. Old subsection (C) dealt with a State's failure to revise a SIP. Both situations are now incorporated in subsection (A) which refers broadly to "required submission[s]." Old subsection (B), which required promulgation of a FIP when a SIP was determined not to meet the requirements of the Act, is incorporated in current subsection (B), which requires promulgation of a FIP when EPA disapproves a SIP.

based on its January 1988 disapproval of California's proposed SIPs.

B

EPA also argues that requiring it to promulgate FIPs for the South Coast at this time would be inconsistent with the 1990 Amendments as a whole because those Amendments impose new deadlines and change certain requirements of the Clean Air Act. The district court found this argument persuasive. It reasoned that if the Act were interpreted to continue EPA's existing obligation to promulgate FIPs for the South Coast, "there would be the anomaly that the SIP prepared by the State under the former criteria and rejected is to be replaced by a FIP prepared under new criteria that the State has never had an opportunity to address." *Coalition for Clean Air*, 762 F. Supp. at 1401. Of course, the proper contents of FIPs for the South Coast are not before us, and we need not decide whether EPA would be required to meet any additional requirements imposed by the 1990 Amendments in promulgating FIPs for the South Coast. The sole question on appeal is whether EPA's obligation to promulgate such FIPs survived the 1990 Amendments. We therefore consider the 1990 changes in the Act's deadlines and requirements for the limited purpose of deciding whether an "anomaly" would result from enforcing the plain language of § 110(c)(1)(B).

On closer inspection, we find that no such anomaly exists. EPA points to the fact that the 1990 Amendments extend the deadlines for attainment of ozone and CO standards for the South Coast until 2010 and 2000 respectively. 42 U.S.C. §7511(a)(1); *id.* § 7512(a)(1). Yet the FIP that EPA has proposed

to adopt for the South Coast, ostensibly under the requirements of the old Clean Air Act, provided for attainment of these standards on precisely the same schedule. 55 Fed. Reg. 36,458, 36,500 (1990). Thus, EPA cannot claim that continuing its obligation to promulgate a FIP for the South Coast will deny the region any extra time to which they would be entitled under the 1990 Amendments.[8]

EPA also argues that the 1990 Amendments require new measures to control oxides of nitrogen (NOx) and volatile organic compounds (VOCs), which are precursors of ozone, which the state must address in the first instance. 42 U.S.C. § 7511a(f). However, there is no reason the state may not propose these new measures as revisions to the FIP under the timetables provided in the 1990 Amendments just as the state would be required to do if a FIP had been in effect when those Amendments were adopted. *See* 42 U.S.C. § 7511a(e). Appellants have not argued that EPA's continuing obligation to promulgate FIPs relieves the state of any new obligations imposed by the 1990 Amendments.

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[8] Judge Noonan asserts that Congress removed the basis for appellants' claim when it extended the deadlines for attainment, but this argument proves too much. *See* Dissent at 7756. By the same logic, Congress would at the same time have removed the basis for all existing FIPs that rest on a state's past failure to meet a deadline. We are aware of nothing in the 1990 Amendments or their legislative history indicating that Congress intended to invalidate all existing FIPs. Indeed EPA agreed at oral argument that, if the South Coast FIPs had been in effect at the time of the 1990 Amendment, those amendments would not have provided the basis for vacating the existing FIPs.

Finally, EPA points out that the 1990 Amendments authorize it, under certain conditions, to approve SIP provisions for the attainment of ozone standards for the South Coast that anticipate new control techniques or the improvement of existing techniques and base attainment on the use of such technological advances. 42 U.S.C. § 7511a(e)(5). This new provision may allow EPA to approve some parts of the ozone SIP that it disapproved in 1988, and Judge Noonan points out that it would "make nonsense" of the 1990 Amendments not to give effect to this provision. *See* Dissent at 7756. However, under § 110(c)(1), EPA has authority to approve a SIP that meets the requirements of the Act at any time prior to the actual promulgation of a FIP. 42 U.S.C. § 7410(c)(1). Thus, there appears to be nothing to stop EPA from allowing California to rely on anticipated technology by approving SIP provisions that now meet the requirements of the Act.

Running throughout EPA's argument is the notion that federal involvement necessarily preempts state planning to control air pollution. However, this is a misconception. The Clean Air Act creates "a federal-state partnership for the control of air pollution," *Abramowitz v. EPA*, 832 F.2d at 1073, which continues after EPA's obligation to promulgate a FIP has been triggered.[9] As we have just observed, the

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[9] Judge Noonan cites Congress' finding in § 101 of the Act that prevention and control of air pollution is "the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3); Dissent at 7757. But Congress also found "that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local government programs to prevent and control air pollution." 42 U.S.C. § 7401(a)(4). Moreover, Congress' de-

state may propose and EPA may approve revisions to a proposed SIP that meet the requirements of the Act at any time prior to the actual promulgation of a FIP. 42 U.S.C. § 7410(c)(1).[10] Even after a FIP is promulgated, the states remain responsible for submitting revisions to the FIP if EPA changes the air quality standards, *see* 42 U.S.C. § 7410(a)(1), or if Congress changes the provisions of the Act, *see, e.g.*, 42 U.S.C. § 7511a(e).[11] Thus, we fail to see how enforcing the plain terms of § 110(c)(1)(B) will create an unintended anomaly.

C

Although the language of § 110(c)(1)(B) is clear on its face, EPA contends that statements by Senators Baucus and Chafee relating to § 193—the Sav-

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cision to require mandatory FIPs if the states failed to provide for attainment of NAAQS shows that Congress did not intend to leave air pollution control to the states alone. Contrary to Judge Noonan's assertion, it does not stand the Clean Air Act on its head to enforce a mandatory obligation imposed by Congress. *See* Dissent at 7757.

[10] Moreover, a FIP, as defined by the 1990 Amendments, is specifically designed to supplement rather than to replace state planning: "a plan (or portion thereof) promulgated by the Administrator *to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan.*" 42 U.S.C. § 7602(y) (emphasis added).

[11] Under § 7511a(e), the state is required to submit revisions to the "applicable implementation plan." The Act defines "applicable implementation plan" as "the portion (or portions) of the implementation plan or most recent revision thereof, which has been approved under section 7410, or promulgated under section 7410(c)." 42 U.S.C. § 7602(q). In other words, it refers both to SIPs approved by EPA and to FIPs promulgated by EPA.

ings Clause—demonstrate Congress' intent to relieve EPA of its obligation to promulgate FIPs for the South Coast. We reject this contention for several reasons. First, there is no need to refer to the legislative history of a statute when the language of the statute is clear. *Toibb v. Radloff*, 111 S. Ct. 2197, 2200 (1991). Second, the statements of individual legislators are entitled to little, if any, weight. "[I]t is the official committee reports that provide the authoritative expression of legislative intent. . . . Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill." *In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988); *United States v. Shaw*, 936 F.2d 412, 416 (9th Cir. 1991). Third, we do not think that the statements by Senators Baucus and Chafee support the EPA's interpretation.

Senator Baucus made the following statements on the floor of the Senate during its final debate on the 1990 Amendments:

> The savings clause in the new legislation is intended to ensure that no backsliding occurs from implementation of adopted, currently feasible measures that EPA has approved as part of a SIP in the past, or currently feasible measures that EPA has added to state plans on its own initiative or pursuant to a court order of settlement, including a Federal Implementation Plan. We do not intend that this savings clause requires EPA to finalize the Federal Implementation Plan in California and preempt the states and regional air quality planning that is ongoing in the Los Angeles area and will otherwise be required un-

> der this legislation. If EPA were to promulgate complete new plans based on requirements of the old Act, the areas subject to those federal plans would be deprived of the opportunity to use the significantly revised and clearly more workable requirements of the new legislation. We agree that this would be unreasonable, particularly since the proposed FIP fails to recognize the critical role that local governments play in reducing transportation-related emissions.
>
> The savings clause provides EPA with significant discretion with respect to FIPs in California. EPA has the obligation to adopt control measures for sources which it exclusively controls when those controls are necessary to help attain national standards or meet other requirements of the Act. But, beyond that, EPA should complete ongoing FIP processes only for the purposes of ensuring that the standards are met by the statutory deadlines.

136 Cong. Rec. S16970 (daily ed. Oct. 27, 1990). Senator Chafee made an almost identical statement. *See* 136 Cong. Rec. S17,237 (daily ed. Oct. 27, 1990). EPA relies on the portion of Senator Baucus' statement that says "[w]e do not intend that this savings clause requires EPA to finalize the Federal Implementation Plan in California . . . ." It is clear from what follows this statement, however, that Senator Baucus' concern is that the FIP not "preempt the states and regional air quality planning that is ongoing in the Los Angeles area and will otherwise be required under this legislation." As we noted in part II.B, *supra*, maintaining EPA's obligation to promulgate ozone and CO FIPs for the South Coast

will not have the effect of preempting state planning or the new state submissions that are required under the 1990 Amendments. Moreover, if EPA's interpretation of Senator Baucus' statement is correct, it is difficult to understand his reference towards the end of the statement to EPA's completing "ongoing FIP processes."

EPA's interpretation is also contradicted by another piece of legislative history that relates specifically to § 110(c)(1) rather than to the Savings Clause. In May, 1990, when the House deleted language that would have made EPA's obligation to promulgate FIPs discretionary, EPA Administrator Reilly wrote to House Speaker Foley:

> The House has [deleted] language that relieved EPA of its current obligations to complete federal implementations plans (FIP's). If current FIP obligations are not relieved, EPA must impose across-the-board, draconian measures devastating the country's largest industrial area. In light of the new regime for state plan submissions, it makes no sense for EPA to impose FIPs before the states have had a chance to meet their new obligations. For these reasons, the Administration strongly objects to the Committee's approach.

136 Cong. Rec. H2771, H2887 (daily ed. May 23, 1990). Thus, EPA complained directly to Congress that unless the language of § 110(c)(1) were changed, EPA would have to promulgate FIPs for the South Coast. However, Congress declined to change the language of the statute. At a minimum, this letter and Congress' response to it show that it is not inconsistent with Congress' intent to require completion

of ongoing FIP processes since Congress adopted language that EPA said would have precisely that effect. We may only speculate about what Congress would think of EPA's current litigation position, which directly contradicts its representation to Congress.

D

EPA also argues that we should defer to its interpretation of the statute because it is the administering agency. *See Chevron USA Inc. v. NRDC*, 467 U.S. 837, 843-45 (1984). Under Chevron, we are required first to exhaust the "traditional tools of statutory construction" to determine if Congress has spoken to the precise question at issue. *Id.* at 843 n.9. "If the intent of Congress is clear, that is the end of the matter." *Id.* at 842-43. In this case, the plain language of § 110(c)(1) expresses Congress' intent that EPA promulgate a FIP when it has previously disapproved a SIP.

However, even if we were to conclude that Congress had no intent on the question, it is doubtful that EPA's interpretation of § 110(c)(1) would be entitled to deference. Its current interpretation is in direct conflict with the interpretation that it expressed to Congress. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *Watt v. Alaska*, 451 U.S. 259, 272-73 (1981). This is not a case in which the agency's change of interpretation reflects accumulated experience or responds to changing circumstances. *See Rust v. Sullivan*, 111 S. Ct. 1759, 1769 (1991). Nor has the agency justified this change with "reasoned analysis." *Id.* This is simply a case in which the agency, having failed to get Congress to

adopt its position, asks the court to do what Congress would not.

E

In sum, we hold that EPA is currently obligated to promulgate ozone and CO FIPs for the South Coast under the plain terms of § 110(c)(1)(B) based on its disapproval of California's proposed SIPs in January 1988. Accordingly, we reverse the decision of the district court. We remand with instructions that the district court reinstate the settlement agreement and establish an expeditious schedule for the promulgation of final FIPs for the South Coast. In establishing the schedule, the district court should bear in mind that promulgation of these FIPs has already been delayed far beyond the statutory deadline, that EPA has already published proposed FIPs for the South Coast, and that the deadline for promulgation of final FIPs was only three months away when EPA moved to vacate the settlement agreement.

III

We turn last to the question of attorney's fees. In an unpublished order, the district court denied appellants' motion for fees in large part. We review the award or denial of attorney's fees for abuse of discretion, but any elements of legal analysis and statutory interpretation which figure in the district court's decision are reviewable de novo. *Keith v. Volpe*, 833 F.2d 850, 854 (9th Cir. 1987). We will reverse if the district court misperceives or misapplies the law governing fee awards. *Ackerley Communications v. City of Salem*, 752 F.2d 1394, 1396 (9th Cir. 1985).

The district court denied appellants fees against EPA for their work opposing the motion to vacate the settlement agreement and dismiss the suit on the ground that appellants had not prevailed in that stage of the litigation. In light of appellants' success on appeal, we hold that they are entitled to fees for their work below. "[A] plaintiff who is unsuccessful at a stage of litigation that was a necessary step to [its] ultimate victory is entitled to attorney's fees even for the unsuccessful stage." *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir. 1991).

The district court also denied appellants fees against EPA for their work opposing EPA's motion to extend the deadlines under the settlement agreement for the proposed and final FIPs. The district court granted EPA's motion to extend the deadline for the proposed FIPs because of the disruption caused by the 1989 San Francisco earthquake. It denied without prejudice EPA's motion to extend the deadline for the final FIPs. The district court concluded that appellants' opposition to the motions was both unsuccessful and unreasonable. We hold that the district court did not abuse its discretion in doing so.

The district court awarded fees against EPA for only 24 hours of work preparing the motion for fees because the court thought it was unreasonable for appellants to move for fees without first attempting a fee settlement. However, local rules do not require parties to confer before filing for fees. In fact, local rule 16.10 requires that motions for fees be filed within 30 days of judgment. Furthermore, in their motion for fees, appellants invited EPA to make an offer regarding fees rather than litigate the matter. EPA responded by choosing to litigate. The Supreme

Court has stated that "[i]deally, of course, litigants will settle the amount of the fee." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). However, this preference for settlement is not embodied in any binding rule. The district court's decision to limit fees for the fee motion on the basis that appellants failed to attempt settlement elevates this preference to the status of a court rule. As such, the decision is a misapplication of law that is not shielded under the abuse of discretion standard. *See Ackerley*, 752 F.2d at 1396. We hold that the district court erred in limiting the fees for preparing the fee motion to 24 hours. EPA's argument that these fees should be reduced because the fee motion was only partially successful should be addressed to the district court on remand.

Finally, the district court denied appellants fees against Southern California Edison for their work opposing Edison's intervention of as plaintiff.[12] The language of 42 U.S.C. § 7604(d) does not preclude an award of fees against a private intervenor. However, "special care" is called for when awarding fees against a private party rather than a government entity because of "[d]iffering abilities to bear the cost of legal fees and differing notions of responsibility for fulfilling the goals of the Clean Air Act." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 692 n.12 (1983). The D.C. Circuit has held that fees against a private intervenor are not appropriate if the intervenor "took a position that reasonably attempted to advance the implementation of the Act." *NRDC v. Thomas*, 801 F.2d 457, 462 (D.C. Cir. 1986);

[12] EPA has taken no position on the question whether appellants are entitled to fees against Edison.

Sierra Club v. EPA, 769 F.2d 796, 810 (D.C. Cir. 1985). We believe this test is sound. Applying it to the facts of this case, we hold that appellants are not entitled to fees against Edison. While Edison's position differed in many respects from the position advanced by appellants, it was reasonably consistent with advancing the implementation of the Clean Air Act. Accordingly, we affirm the district court's decision denying fees against plaintiff-intervenor Edison.

IV

For the reasons stated herein, the decision of the district court vacating the settlement agreement and dismissing the case is REVERSED. The case is REMANDED for reinstatement of the agreement. On remand the district court is instructed to establish an expeditious schedule for promulgation of final ozone and CO FIPs for the South Coast consistent with this opinion. The district court's order denying attorney's fees is AFFIRMED in part and REVERSED in part.

NOONAN, Circuit Judge, dissenting:

This case turns on the meaning of an act of Congress. In determining that meaning we need not go beyond the text if, as I believe, the text is clear. In particular, I see no need to rely on the statements of Senators Baucus and Chafee or to take into account the statement, made in the course of legislative bargaining in May 1990, by EPA Administrator Reilly. These statements serve only to confirm what anyone would know, that Congress was acutely aware of the air pollution problem of the South Coast and legis-

lated with that problem in mind. The meaning of the statute, however, does not depend on the Senators' or the Administrator's gloss.

The Background Litigation.

On January 22, 1988, EPA disapproved California's SIPs for the South Coast ozone and carbon monoxide levels. On February 22, 1988 the Coalition for Clean Air and the Sierra Club ("the Coalition") brought suit against EPA seeking an order under the Clean Air Act Amendments of 1970 (the 1970 Amendments), directing EPA under 42 U.S.C. § 7410 (c) of the Act to prepare, propose and promulgate a FIP for the South Coast that would provide for the attainment of the then existing air standards for ozone and carbon monoxide. On February 13, 1989, the parties entered into a "Stipulation and Agreement of Partial Settlement" ("the Settlement"). The EPA agreed to publish its tentative FIP in the Federal Register by April 30, 1990 and to set forth its final implementation plan in the Federal Register by February 28, 1991. The suit was stayed till March 31, 1991. The parties reserved the right to argue to the court the effect of any legislation that might be passed by Congress during the stay.

The Coalition had the right under the Settlement to move the court to vacate the stay if EPA did not keep the agreed deadlines. EPA did not observe the deadlines. The district court extended the date for the tentative FIP to July 31, 1990. EPA actually filed it in September 1990. The final FIP was never published.

In November 1990 Congress enacted the Clean Air Act Amendments of 1990 ("the 1990 Amendments").

The stay was never vacated, and it continued to be in effect when on November 30, 1990 EPA brought this action to vacate the settlement and dismiss the Coalition's complaint.

The Repeal of Section 7410(c) of the 1970 Amendments.

The following language of the 1970 Amendments was deleted by the 1990 Amendments:

> (1) The Administrator shall, after consideration of any state hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—
>
> > (A) the State fails to submit an implementation plan which meets the requirements of this section,
> >
> > (B) the plan or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or
> >
> > (C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.
>
> If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of

> such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section. Notwithstanding the preceding sentence, any portion of a plan relating to any measure described in the first sentence of section 7421 of this title (relating to consultation) or the consultation process required under such section 7421 of this title shall not be required to be promulgated before the date eight months after such date required for submission.

It was this language that imposed a categorical obligation on EPA to issue a FIP if a state defaulted on its obligation to provide a suitable SIP. It was this language on which the Coalition had relied in the suit that resulted in the Settlement. With the excision of this language by Congress the foundation of the Settlement disappeared.

New Section 7410(c) of the 1990 Amendments.

Congress in 1990 rewrote Section 7410(c) as follows:

> (1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—
>
> > (A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under section 7410(k)(1)(A).

The 1990 Amendments imposed an obligation of EPA to issue a FIP within 2 years of a state's de-

fault, rather than the obligation to do so "promptly" or within six to eight months as the 1970 Amendments required. The 1990 Amendments triggered this obligation by reference to an entirely new part of the law, § 7410(k). The provision required EPA to set "minimum criteria" for any state plan and to do so "within 9 months after the enactment of the Clean Air Act Amendments of 1990."

Alternatively, the EPA acquired the obligation to issue a FIP "within 2 years after the Administrator . . . (B) disapproves a State implementation plan in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or revision, before the Administrator promulgates such Federal implementation plan." Section 7410(c)(1)(B).

It is this language that the Coalition now relies on. It is the language that the Coalition maintains imposes the same obligation on EPA that existed under the 1970 Amendments. It is this language that the Coalition argues is to be understood as applicable not only to future but to past disapprovals of State plans by EPA.

Comparison of the new language with the old dispels the Coalition's contention. First, it is doubtful that a verb in the present tense, "disapproves," can be read as a verb in the past tense, "has disapproved." *Gwaltney* indicates that it should not be so read. *Gwaltney & Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 59 (1989). Second, the old language provided that the EPA should "promptly" move to publish a FIP once the Administrator had determined that the State plan was not "in accordance with the requirements of this section." The new language gives EPA two years within

which it should issue a FIP. Third, the old language gave the State 60 days or a longer period prescribed by EPA to correct a provision of the plan relating to air quality control. The new language permits the State to correct any deficiency without any time limit being prescribed short of the two years set by the statute for EPA's action. The old statute has been repealed. The new statute is certainly comparable, but its language is future-looking and its commands different from the old.

This conclusion comes from inspection of (B), the fragment of the new law on which the Coalition relies. The conclusion is reinforced if the new law is inspected more broadly. To begin with, the Coalition argues as though new (A) were not on the books. There is no reason to ignore (A). It gives a cross-reference to another new and important part of the 1990 Amendments, Section 7410(k)(1)(A). This section begins, "Within 9 months after the date of the Clean Air Act Amendments of 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this section." Beyond dispute, EPA's obligations here are set in terms of the date of enactment of the 1990 Amendments. To suppose that its obligations under (B) are not is to do violence to the sense of the statute.

Section 7410(k), to which A makes cross-reference, goes on to lay out an elaborate timetable for EPA action in regard to State plans that do or do not meet the minimum criteria. The Coalition's narrow focus on B reads this timetable out of the law. On the Coalition's reading, none of Section 7410(k) has any relevance because EPA disapproved Cali-

fornia's SIP in 1988. The Coalition's reading makes otiose as regards a major area of the country the careful prescriptions of the 1990 Amendments. By every canon of construction A and B should be read harmoniously and as a whole.

The Coalition argues that "Section 110c [Section 7410(d)] was not new." Read as simply B of the new Section 7410(c), it was new. Read again as both A and B of the new Section 7410(c), it was new. The contention that it was not disregards the text of the statute.

Other Relevant Changes Made by the 1990 Amendments.

The 1977 Amendments to the Clean Air Act required a State to attain the required air quality standards by December 31, 1987. 42 U.S.C. § 7502 (a)(2) (as of 1977). It was California's failure to provide for this attainment that led EPA to disapprove the State's SIP. The date set by the 1977 Amendments was eradicated by the 1990 Amendments. The South Coast must now demonstrate attainment with the carbon monoxide standard by 2000 and with the ozone standard by 2010, 42 U.S.C. § 7512(a)(1). The new statute removes the basis for the Settlement. The Coalition in its Opening and Reply Briefs fails to address this substantial change in the law.

The 1990 Amendments also provide a detailed timetable in accordance with which California must move to the attainment of the goals to be achieved by 2000 and 2010. This timetable is set in explicit reference to the date of the enactment of the 1990 Amendments, see, e.g., 42 U.S.C. § 7511a(c), (d) and (e).

It makes nonsense of the provisions of this timetable to superimpose upon them the Settlement which depends on the 1970 and 1977 Amendments.

For the first time the new law permits EPA to approve, in a statutorily defined Extreme Area (such is the South Coast for ozone), provisions of a SIP which "anticipate development of new control techniques," provided that "such provisions are not necessary to achieve the incremental emission reductions required during the first 10 years after the date of the Clean Air Act Amendments of 1990." 42 U.S.C. § 7511a(e)(5). Again, the timing is set in terms of the 1990 Amendments. Again, something different has been added. EPA had disapproved California's SIPs in terms of the old law that left no such possibility for technological breakthroughs. It would again make nonsense of the new law to hold that the old disapproval must continue in effect despite the relaxation of the standards effected by the 1990 changes.

The Clean Air Act of 1960 proclaimed that "the prevention and control of air pollution at its source is the primary responsibility of state and local governments." 42 U.S.C. § 7401(a)(3) (unamended). The Act stated one of its purposes was "to provide technical and financial assistance to state and local governments in connection with the development and execution of their air pollution prevention and control programs." 42 U.S.C. § 7401(b)(3) (unamended). The 1990 Amendments left (b)(3) unchanged. The 1990 Amendments amended (a)(3) to declare "that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of state and local governments." 42

U.S.C. § 7401(a)(3) (1990)). In the face of this ringing assertion of state primacy, the Coalition's argument for federal action stands the legislation on its head.

The Clean Air Act in its original form and as amended in 1990 specifies that the State has primary responsibility for satisfying pollution requirements and requires it to develop a plan in the first instance. That applies to the new requirements enacted in 1990. California must have an opportunity to address these requirements before EPA steps into the breach.

The Savings Clause.

The Coalition's fallback position, not reached by the majority opinion, is that the 1990 Amendments contain what is styled "General Savings Clause." This part of the statute reads as follows:

> General savings clause
>
> Each regulation, standard, rule, notice, order and guidance promulgated or issued by the Administrator under this Act, as in effect before the date of the enactment of the Clean Air Act Amendments of 1990 shall remain in effect according to its terms, except to the extent otherwise provided under this Act, inconsistent with any provision of this Act, or revised by the Administrator. No control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before the date of the enactment of the Clean Air Act Amendments of 1990 in any area which is a containment area for any air pollutant may be modified after such enactment in any manner unless the modification

> insures equivalent or greater emission reductions of such air pollutant.

42 U.S.C. § 7515.

The only possibly relevant language is the single sentence that speaks of a "control requirement" "required to be adopted by an order, settlement agreement or plan in effect before the date of the enactment of the Clean Air Act Amendments of 1990. . . ." But even this language does not help the Coalition. A "control requirement" is a term of art. A control requirement is "a discrete regulation directed at a source of pollution." 56 Fed. Reg. 828 (January 9, 1991). In the same way, the 1990 Amendments under the caption "Control requirements" speak of the regulations imposed on "a unit," e.g., a fossil fuel-fired combustion device, 42 U.S.C. § 7651k(1) and § 7651a(15).

A control requirement is not a FIP. The Settlement Agreement required EPA to promulgate a FIP. The Settlement Agreement did not require the adoption of any particular control requirement. The General Savings Clause, therefore, does not save the Settlement Agreement.

To the contrary, the regular rule *expressio unius, exclusio alterius* applies. Congress enumerated what it wanted to survive the repeals effected by the 1990 Amendments. As the majority opinion correctly notes, Congress did not repeal the basis for existing FIPs. The 1990 Amendments specifically preserved every regulation in effect before the date of the amendments. The Settlement Agreement that merely required a FIP was not a regulation and it was not a control agreement. It was not spared.

Expressio unius, exclusio alterius—this standard method of interpreting a statute was first invoked here by the Coalition. But its application defeats the Coalition's reading of the 1990 Amendments. Saving regulations and control requirements, Congress deliberately and decisively omitted the kind of settlement the Coalition relies on.

Conclusion.

There is no one, I suppose, who does not desire a cleaner, brighter, healthier South Coast. Attainment of the goal, however, is not without substantial costs. The conflict that the costs have caused is reflected in the actions of EPA and in the congressional legislation. The Coalition makes much of the delay in achieving acceptable standards for ozone and carbon monoxide. It accuses EPA of "footdragging" and even of "entrenched footdragging," a difficult accomplishment. But even if the courts could supply what the Coalition sees as the missing will in the agency, the courts cannot supply a will that is not present in the legislation. In a major economic and political battle Congress has chosen the path of slow progress. It is not the task of judges to produce a different rate of attainment. The district court properly dismissed the Coalition's suit.

On the assumption that the majority opinion remains the law, I concur in the judgment as to attorney's fees.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Date 1/9/91

Case No. CV88-4414-HLH

COALITION FOR CLEAN AIR ET AL.

v.

ENVIRONMENTAL PROTECTION AGENCY

DOCKET ENTRY

[Entered Jan. 9, 1991]

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

Present:

Hon. HARRY L. HUPP, Judge
MILLI BORGARDING, Deputy Clerk

Attorneys Present for Plaintiffs:

ALAN WALTNER

Attorneys Present for Defendants:

KAREN L. EGBERT, DOJ & Ian Fan, AUSA—for EPA

For Defts-in-Intervention: COLIN LENNARD for SCAQMD; PETER M. GREENWALD for SCAQMD; H. MOSLEY for S.C. Gas Co.; R. LANNEN for S.C. Edison

Proceedings:

EPA'S MOTION TO VACATE SETTLEMENT AGREEMENT AND DISMISS THE COMPLAINT

ORDER (also, if applicable, findings and memorandum opinion):

The motion to vacate the settlement agreement and dismiss the action is granted. The action is dismissed.

The question is whether Congress, in enacting the 1990 amendments to the Clean Air Act (hereafter the "Act"), intended to require that a Federal Implementation Plan (FIP) prepared under the new criteria in the amended Act be promulgated by EPA before there is rejected for non-compliance with the Act by EPA a State Implementation Plan (SIP) hereafter to be prepared under the new criteria and timing schedules in the amended version of the Act.

Under the former version of the Act, the State's plan for the South Coast Air Basin (SCAB) was rejected (*Abramowitz* 9 Cir '87 832 F2d 1071) and EPA acquired the obligation under the former version of the Act to prepare a FIP. Plaintiffs brought this action to compel EPA to prepare the FIP. EPA recognized its obligation to do so, and an agreement

was entered into, approved by the court on March 28, 1989, which set the date for promulgation of the FIP by EPA, since extended to Feb. 28, 1991. In September, 1990, EPA published in the Federal Register its tentative FIP for comment. However, Congress passed extensive amendments to the Act which were signed into law by the President on Nov. 15, 1990. The amendments to the Act change numerous standards which States must meet, set forth new schedules for the submission of SIP's, and continues the provision that if the State fails to submit a plan, or a State SIP is disapproved, the EPA shall prepare an FIP (now, within 2 years of disapproval) or may instead approve a State proposed revision of the SIP (this latter provision is significant because it is clear that California continues to submit significant revisions to its rejected SIP to EPA, including the epochal 1989 plan developed by South Coast Air Quality Management District (SCAQMD)). Thus, the method of enforcement (a federal plan if the state does not come up with an acceptable one) is preserved from the former Act, but EPA has more time, opportunity, and flexibility to develop its own plan or approve State modifications. The difficulty presented by this motion is that Congress did not expressly say whether it intended to start the SIP process over again or not, and it is, therefore, in question whether it is Congress' intent in this circumstance that EPA must follow through on the presently pending FIP, even though the State has not had an opportunity to develop its own plan under the new criteria and schedules.

It must be said that the statute is ambiguous. The court makes this determination not alone from the fact that both EPA and plaintiffs argue that the stat-

ute is crystal clear and unambiguous—their way. Amended § 110 provides in part that:

> "The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator- . . . (B) disapproves a State implementation plan in whole or in part . . .".

Plaintiffs argue that there is no ambiguity here because the EPA disapproved the old SIP in 1988, and that the EPA plainly owes everyone concerned a FIP. What makes the language ambiguous, however, is that the legislation revamped the schedule for submission of SIPs, allowing time in the future to submit the same and plainly assumes that States which did not have approved SIPs, or imposed FIPs, at the date of the amendments to the Act, were to submit them within the new timetables set forth in the Act. The question, then, is which rejected SIP is the revised § 110 now referring to—the one which was rejected in 1988 or the new one which must be submitted under the new criteria and on the new time schedule? The answer is not provided by a reading, literal or otherwise, of § 110. However, the structure of the amended Act, with revamped criteria and timing for SIPs, and with an obvious policy that the States are encouraged to take the lead, with the potential FIP to be the stick that drives them, is clear. There is an additional reason to believe that revised § 110 refers to the new SIP to be prepared by the States under the revised criteria. If the Act were interpreted otherwise, there would be the anomaly that the SIP prepared by the State under the former criteria and rejected is to be replaced by a FIP pre-

pared under the new criteria that the State has never had an opportunity to address. In view of Congressional policy to have States take the lead on preparation of plans, such an interpretation seems less likely than the contrary. From this, it is logical to conclude that the SIP referred to in § 110 is the new SIP required of the States and referred to in other amendments to the Act. The court so concludes.

The court is aided in reaching this result by the usual rule that an administrative agency's interpretation of ambiguous legislation is to be given heavy weight. (*Chevron USA, Inc.* '84 467 US 837, 81 LEd2d 694, 703.)

The Congressional history is inconclusive. Plaintiffs point out that EPA strongly pushed revision of § 110 to make the FIP discretionary, or eliminate the requirement that one be promulgated on State failure, and that Congress expressly declined to adopt the EPA view. This circumstance appears irrelevant to the question posed on this motion to the court. There is no doubt at all that under the amended Act EPA must prepare a FIP on failure of a state to propose one meeting the requirements of the Act, but the question which remains is to what SIP does the Act refer to in imposing this responsibility.

Plaintiffs (joined in this respect by SCAQMD) also argue that the "savings" clause, § 193, preserves the order of this court. That section provides that no "control requirement" in effect before the effective date of the 1990 amendments to the Act is to be modified afterward "unless the modifications insures equivalent or greater emission reductions of such air pollutant". It is apparently argued that the requirement that EPA promulgate a FIP is a "control requirement", or at least there would be requirements

if the FIP were adopted. "Control requirement" is not defined in the Act, but the court thinks that the phrase cannot lend itself to the pending requirement that EPA propose a FIP or to the hypothetical contents of the FIP if one had been adopted before the amendments to the Act, for the reason that there is no present specification of the details of control of various sources of emission control. Thus, it is determined that § 193 does not affect the question at issue. In connection with the interpretation of § 193, the SCAQMD raises some troublesome concerns. SCAQMD notes some severe practical problems which will ensue if EPA does not move forward with a FIP which places limitations on sources of pollution beyond state control and exclusively subject to federal regulation (i.e., ships, aircraft, autos made for sale in the other 49 states, etc., referred to generally as "federal pollution"). It is asserted (without any apparent contradiction) that control of such sources is a prerequisite if the ambient air standards are to be met at all, and that even if the revised SIP presently pending before the EPA is fully implemented, this federal component can only be regulated by EPA. Thus, in SCAQMD's view, a FIP is a necessity even though SIP modifications presently proposed by the State may take care of pollution sources within state control. This concern is troublesome because Congress does not appear to have dealt with it at all. The Congressional plan is to require States to adopt an SIP, and does not appear to recognize, at least in the statute, that Federal controls may also be necessary, although there is a new provision giving EPA permission to issue a partial FIP to fill in the gaps in a state SIP. Presumably, this provision could be used to cover "federal pollution", but § 193 does not re-

quire this type of FIP to be issued at this time, as urged by SCAQMD. The requirement that a FIP be adopted is only triggered by an inadequate SIP. SCAQMD contemplates a coordinated State and Federal plan. It argues that § 193 should be interpreted at least to require EPA to adopt now the necessary Federal part of the plan even though further SIPs may be developed on the delayed schedule allowed by Congress. This view is supported by quotations from Senators Chaffee and Baucus, which assert somewhat ambiguously that § 193 means substantially that. The difficulty is that the statute failed to incorporate anything close to what the senators apparently thought was in the Act. § 110 was left virtually and ambiguously untouched, and the savings clause says nothing about EPA's obligation to adopt a FIP for Federal sources of pollution while letting the states proceed on their revised SIPs.

Senator Baucus was Chairman of the Conference Committee which resolved the differences between the House and Senate versions. His commentary, while apparently not a formal committtee report, thus has somewhat more relevance to Congress' intent than would a stray statement made in floor debate by an individual Senator. He said:

> "We do not intend that this savings clause [§ 193] requires EPA to finalize the state's and regional air quality planning that is ongoing in the Los Angeles area and will otherwise be required under this legislation. If EPA were to promulgate complete new plans based on the requirements of the old Act, the area subject to those federal plans would be deprived of the opportunity to use the

> significantly revised and clearly more workable requirements of the new legislation. We agree that this would be unreasonable, particularly since the proposed FIP fails to recognize the critical role that local governments play in reducing transportation-related emission.
>
> The savings clause provides EPA with significant discretion with respect to FIPs in California. EPA has the obligation to adopt control measures for sources which it exclusively controls [i.e., "federal pollution"] when those controls are necessary to help attain national standards or meet other requirements of the Act but, beyond that, EPA should complete ongoing FIP processes only for the purposes of ensuring that the standards are met by the statutory deadlines."

The statement of Senator Chaffee in answer to the questions of Senator Wilson on the Senate floor was to the same effect. The statement is moderately clear until one comes to the second paragraph. The amended Act does not appear to have told EPA to go ahead and adopt a FIP for "federal pollution" while waiting for the state to finish the revised SIP. The first paragraph makes it clear, however, that the savings clause (and, by implication, § 110) does not require EPA to develop an entire new FIP until the State proposes a revised SIP. SCAQMD suggests that this statement be used to interpret the savings clause as requiring EPA to promulgate a FIP on federal sources of pollution while continuing to work on the State SIP for state sources. The language used, however, is not susceptible to this interpretation, and this approach, even if considered desirable, is not required by the amended Act.

All parties verbally accept the axiom that this court may not make policy. In this they are correct; the court may do only what it believes Congress has authorized or required, even though the parties and it may have other ideas as to what Congress should have done. The court must disregard the occasional and tempting invitations of the parties to construe the legislation to achieve what is believed to be desirable ends. As best the court can interpret the intentions of Congress, the EPA does not now have to proclaim a FIP.

The motion is granted. EPA is to submit forthwith an order vacating the settlement agreement and order and dismissing the action.

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APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 91-55383
91-55386

COALITION FOR CLEAN AIR; ET AL.,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., DEFENDANTS-APPELLEES

ORDER

[Filed Sep. 11, 1992]

Before: GOODWIN, NORRIS, and NOONAN, Circuit Judges

Judges Goodwin and Norris have voted to deny the petition for rehearing. Judge Norris has voted to reject the suggestion for a rehearing en banc, and Judge Goodwin has recommended the same. Judge Noonan would grant the petition for rehearing and accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

APPENDIX D

STATUTORY PROVISIONS INVOLVED

Section 101 of the Clean Air Act, 42 U.S.C. 7401, provides:

(a) Congressional findings

The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) Declaration of purpose

The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

(c) Pollution prevention

A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local government actions, consistent with the provisions of this chapter, for pollution prevention.

Section 110(c) of the Clean Air Act, 42 U.S.C. 110(c), provides:

Preparation and publication by Administrator of proposed regulations setting forth implementation plan; parking surcharge; plan implementation

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—

> (A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under section 7410(k)(1)(A) of this title, or
>
> (B) disapproves a State implementation plan submission in whole or in part,
>
> unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

Section 193 of the Clean Air Act, 42 U.S.C. 7515, provides:

> Each regulation, standard, rule, notice, order and guidance promulgated or issued by the Administrator under this chapter, as in effect before November 15, 1990 shall remain in effect according to its terms, except to the extent otherwise provided under this chapter, inconsistent with any provision of this chapter, or revised by the Administrator. No control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before November 15, 1990 in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990 in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.

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(3)

No. 92-798

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, PETITIONERS

v.

COALITION FOR CLEAN AIR, INC., *et al.*, RESPONDENTS

On Petition For A Writ Of Certiorari
To the United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS COALITION FOR CLEAN AIR AND SIERRA CLUB

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QUESTIONS PRESENTED

1. Does Section 110(c) of the Clean Air Act, as amended in 1990, 42 U.S.C. § 7410(c), require the Environmental Protection Agency ("EPA") to promulgate Federal Implementation Plans ("FIPs") for ozone and carbon monoxide for the South Coast Air Basin based upon EPA's disapproval in January 1988 of the State Implementation Plan ("SIP") submitted for the South Coast?

2. Should EPA's representations to Congress prior to enactment of the 1990 Clean Air Act Amendments, that the language ultimately adopted in Section 110(c) would mandate completion of the South Coast FIPs, be considered persuasive in interpreting the intent of Congress?

3. Independently of the requirements of Section 110(c), does Section 193 of the 1990 Amendments, 42 U.S.C. § 7515, preserve a settlement agreement and order thereon that, as of the date of the Amendments, required EPA to finalize the South Coast FIPs and associated control requirements by February 28, 1991?

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-798

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, PETITIONERS

v.

COALITION FOR CLEAN AIR, INC., *et al.*, RESPONDENTS

On Petition For A Writ Of Certiorari To the United States Court Of Appeals For The Ninth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS COALITION FOR CLEAN AIR AND SIERRA CLUB

The Coalition for Clean Air and Sierra Club (jointly, the "Coalition")[1] oppose the Environmental Protection Agency's ("EPA") Petition for Writ of Certiorari ("Petition") and urge that the Petition be denied. The Ninth Circuit Court of Appeals correctly held that EPA is obligated to complete Federal Implementation Plans ("FIPs") for California's South Coast Air Basin, a holding applicable to a very limited set of specific situations that will not recur.

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[1]Respondents Coalition for Clean Air and Sierra Club are not-for-profit corporations that do not have publicly traded stock, or parent or subsidiary corporations. Sup. Ct. R. 29.1.

STATEMENT OF THE CASE

For purposes of this brief, the Coalition incorporates the statement of facts and historical background set forth by the Court of Appeals. Petition at 2a-8a. The following statement clarifies and emphasizes key points.

This case seeks enforcement of EPA's mandatory duty to complete FIPs for the South Coast Air Basin and revolves around interpretation of the provision of the Clean Air Act establishing that mandatory duty -- Section 110(c), as amended in 1990, 42 U.S.C. § 7410(c) (Supp. II 1990). Section 110(c) presently provides: "The Administrator **shall** promulgate a Federal implementation plan at any time within 2 years after the Administrator . . . **disapproves a State implementation plan submission in whole or in part** . . . ." 42 U.S.C. § 7410(c)(1)(B) (Supp. II 1990) (emphasis added).

EPA's duty to promulgate the South Coast FIPs was triggered by the agency's January 22, 1988, promulgation of a final rule disapproving carbon monoxide ("CO") and ozone SIP submissions originally prepared by the South Coast Air Quality Management District ("SCAQMD") in 1982. 40 C.F.R. § 52.237(a)(1) (1991); 53 Fed. Reg. 1780-81 (1988). In the preamble to this final rule, EPA described its action:

> This notice announces EPA's **final disapproval** of the California State Implementation Plan (SIP) for ozone and carbon monoxide (CO) in the South Coast Air Basin (SCAB). . . . **EPA's disapproval** of the South Coast SIP is effective February 22, 1988.

53 Fed. Reg. at 1780 (emphasis added). EPA's disapproval

regulation currently remains in effect.[2]

By disapproving the South Coast SIP in 1988, EPA continued what should have been no more than a six month gap in federally enforceable implementation plans for the South Coast Air Basin, a gap that presently exists only in three areas of California, including the South Coast.[3] EPA acknowledged its duty by entering into a settlement agreement committing the agency to complete the FIPs by February 28, 1991. Proposed FIPs were published in the Federal Register on September 5, 1990, 55 Fed. Reg. 36,458 (1990).

EPA, in the meantime, lobbied Congress to eliminate its FIP obligations, enjoying early success in the Senate. *E.g.*, S.

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[2]The savings clause in Section 193 of the 1990 Amendments expressly saves the disapproval action since it is contained in a regulation. 42 U.S.C. § 7515 (Supp. II 1990). The statement to the contrary in the dissent below, that "[i]t would . . . make nonsense of the new law to hold that the old disapproval must continue in effect despite the relaxation of the standards effected by the 1990 changes . . . ." is incorrect. Petition at 31a. Congress provided for the continuing effect of adopted EPA regulations approving or disapproving SIPs.

[3]Most other areas of the country have EPA-approved plans that, at least on paper, contain enough control measures to provide for attainment of National Ambient Air Quality Standards. In those areas, a federally-approved SIP remains in effect until plan revisions required by the 1990 Amendments are approved by EPA. In California, in addition to the South Coast, neither a complete attainment SIP nor a FIP is in effect in the Sacramento and Ventura areas. To Respondents' knowledge, there are only two other areas of the country where SIPs were disapproved and not adequately revised by the state in question before the 1990 Amendments. In both of these areas (Maricopa and Pima Counties, Arizona and Chicago, Illinois), EPA subsequently has promulgated a FIP. 57 Fed. Reg. 8268 (1992); 55 Fed. Reg. 26,814 (1990).

1630, 101st Cong., 1st Sess. § 105 (1989); 135 Cong. Rec. S11,141 (daily ed. Sept. 14, 1989). However, Senate language that would have eliminated EPA's mandatory duty to promulgate FIPs was removed by a May, 1990 House version of the bill containing the language of Section 110(c) ultimately adopted by Congress. H.R. 3030, 101st Cong., 2d Sess. § 179, 136 Cong. Rec. H2778 (daily ed. May 23, 1990).

In response to the House language that was enacted in the 1990 Amendments, the Administrator of the EPA, William Reilly, wrote to House of Representatives Speaker Thomas Foley and objected:

> The House has [deleted] language that relieved EPA of its **current obligations** to complete federal implementation plans (FIP's). If **current FIP obligations** are not relieved, EPA must impose across-the-board, draconian measures devastating the country's largest industrial area. In light of the new regime for state plan submissions, it makes no sense for EPA to impose FIPs before the states have had a chance to meet their new obligations. For these reasons, the Administration strongly objects to the Committee's approach.[4]

136 Cong. Rec. H2771, H2886-88 (daily ed. May 23, 1990)

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[4]The final version of the bill enacted by Congress added an additional clause to Section 110(c) allowing EPA to avoid FIP promulgation if it first approves a state plan. 42 U.S.C. § 7410(c)(1) (Supp. II 1990). Apart from this change, the language of H.R. 3030 on May 23, 1990, which the EPA letter addressed, was identical to the final enacted version. *See* 136 Cong. Rec. H2778 (daily ed. May 23, 1990).

(emphasis added).[5] EPA recognizes that, "[t]o be sure, the language of Section 110(c) referred to in the Administrator's letter was unchanged in the bill as finally enacted . . . ." Petition at 20. Thus, EPA's contemporaneous interpretation and representations to Congress were that Section 110(c) as adopted obligated EPA to complete the South Coast FIPs.[6]

The 1990 Amendments also contained a broadly worded savings clause, which provides that:

No control requirement in effect, or required to be adopted

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[5]EPA's letter to the House continued as follows: "**In addition to current FIP obligations**, the House Committee bill requires EPA to promulgate comprehensive FIPs in the future . . . ." *Id.* (emphasis added). Thus, EPA Administrator Reilly explicitly distinguished previously triggered FIPs from FIPs that would be triggered by future disapprovals. Through his letter, EPA interpreted the language ultimately adopted by Congress to trigger FIPs by both past and future SIP disapprovals.

[6]EPA claimed **for the first time in its rehearing petition below** that its true "contemporaneous" interpretation of Section 110(c) is a Federal Register notice published January 9, 1991, which asserted in the context of *Delaney v. Environmental Protection Agency*, 898 F.2d 687 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 556 (1990), *motion to recall mandate denied*, March 20, 1991, that EPA was no longer obligated to complete FIPs for **Arizona**. 56 Fed. Reg. 826 (1991). Generally, this Court should decline review on issues not raised in a timely manner below. *See EEOC v. FLRA*, 476 U.S. 19, 24 (1986) ("Our normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals."). The rule applies with full force where, as here, the issue was not raised until a petition for rehearing in the Court of Appeals. *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984). EPA previously relied upon this Federal Register notice in its unsuccessful motion to recall mandate in *Delaney* that relied on the same arguments presented in the Petition herein. The panel in that case correctly declined to give weight to such litigation posturing.

> by an order, settlement agreement, or plan . . . may be modified after such enactment in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.

42 U.S.C. § 7515 (Supp. II 1990). EPA's proposed FIP, which was required to be adopted by the settlement agreement in this case, included numerous "control requirements."[7]

EPA's assertion in the Petition that "the legislative history of the Section 193 **savings clause** indicated that Congress did not intend EPA to finalize FIPs for the Los Angeles area" relies on misleading partial quotations of Senators Baucus and Chafee and misapplies those quotes in its interpretation of Section 110(c). Petition at 8 (emphasis added), 20. EPA omits the key statements by those Senators that: "**EPA has the obligation to adopt control measures for sources which it exclusively controls**

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[7]The proposed FIP amply confirms that the settlement obligated EPA to adopt control requirements as part of the FIP. *See* 55 Fed. Reg. 36,458 (1990). Throughout the proposed FIP, EPA interchangeably refers to its provisions as "control measures," "control requirements," or simply "requirements." For example, EPA states: "Estimates of **control requirements** for the South Coast Federal Implementation Plan range from $2 to $6 billion . . .," 55 Fed. Reg. at 36,460; "The 'backstops' would be rescinded or their **requirements** lessened if State and local efforts suffice," *id.* at 36,500; "EPA is also proposing to promulgate a **measure** of one no drive day per week . . . . EPA would only implement this **requirement** as a backstop . . . ." *id.* at 36,506; "Federally enforceable means all . . . **requirements** within any applicable implementation plan," *id.* at 36,545 (emphasis added). The applicability section of each of the FIP backstop measures also describes those measures as "requirements." *e.g.*, 55 Fed. Reg. at 36,552. The fact that Congress was aware of these descriptions in the proposed FIP when it adopted the 1990 Amendments further confirms that the savings clause is intended to apply to control requirements of the sort set forth in EPA's proposed rulemaking.

when those controls are necessary to help attain national standards or meet other requirements of the Act. But, beyond that, **EPA should complete ongoing FIP processes** only for the purposes of ensuring that the standards are met by the statutory deadlines." 136 Cong. Rec. S16,895, S16,970 (daily ed. Oct. 27, 1990) (emphasis added).[8] The portions of the Baucus and Chafee statements on which EPA so heavily relies simply state that the **savings clause** does not require EPA to complete the FIPs **in the form proposed in September, 1990**, and do **not** support EPA's assertion that the FIPs need not be completed at all. *See* Petition at 17a-18a, Appendix 2 hereto at 6a.

EPA has now completed two of the five disputed FIPs that were in preparation during debates on 1990 Amendments. *See* n.3, *supra*. Only the FIPS for the three California areas remain to be adopted.

Given the plain language of Section 110(c) compelling FIP promulgation where SIPs are disapproved, and EPA's contemporaneous representations to Congress in Administrator Reilly's letter that EPA would be required to complete the South Coast FIPs if the House version of Section 110(c) were passed, two panels of the Ninth Circuit and a district court[9] have concluded that EPA remains obligated to complete these and

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[8]EPA cites no legislative history directly supporting its position that the South Coast FIPs need not be completed at all, and the Coalition has found no legislative history to that effect.

[9]In addition to this case, EPA has unsuccessfully presented these same arguments in *Delaney v. EPA*, *supra* at n.6, and *Environmental Council of Sacramento v. EPA*, Civ. No. S-87-420 EJG (E.D.Cal. Dec. 2, 1991), *aff'd*, No. 92-15293 (9th Cir. July 9, 1992), *petition for cert. filed*, November 6, 1992. The *Environmental Council* decision is published in the companion petition for writ of certiorari filed by the United States on November 6, 1992.

similar FIPs. Except for the district court opinion in this case, no court has concluded to the contrary. These holdings are correct and should not be disturbed.

REASONS FOR DENYING THE WRIT

A. Introduction.

EPA concedes that the legal issues presented by the Petition are limited to this case and two other cases in the Ninth Circuit, and that those issues will not recur. Petition at 26. In seeking certiorari, EPA must therefore demonstrate not only that the decision below is in error, but also that an important question is presented. Neither is the case.

The legal arguments presented in EPA's Petition are flawed by an unsupported and grammatically mistaken analysis of Section 110(c), misstatement and misapplication of the legislative history, and an improper reading of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Further, the Petition repeatedly alleges, without support, many of the same policy objections to FIPs that failed to persuade Congress. EPA's efforts are misplaced, since it is not the judiciary's role to decline enforcement of Congressional directives based upon its own view of proper policy. *TVA v. Hill*, 437 U.S. 153, 195 (1977) ("[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense . . . .' Our Constitution vests such responsibilities in the political branches.") EPA's baseless policy arguments are all aimed toward the improper end of convincing this Court to produce a result that EPA sought from Congress **and that Congress refused to grant.**

Moreover, even if such policy arguments could properly be taken into account by this Court, those offered by EPA are neither compelling nor even properly supported. EPA's policy claims boil down to two basic assertions: *first*, that FIPs inappropriately intrude on state planning efforts, and *second*, that FIPs are burdensome and inefficient. Neither assertion is correct, nor is either relevant to this case.

B. FIPs Will Support, Rather Than Interfere with, State Planning Efforts in the South Coast.

EPA's objection that the FIPs will intrude on the SCAQMD's planning efforts in the South Coast (Petition at 13) is flatly contradicted by that agency's intervention in support of the Coalition in this case. Indeed, the SCAQMD, the agency responsible for state air quality planning for the South Coast, has concluded that, absent a FIP, attainment of the National Ambient Air Quality Standards ("NAAQS") will remain out of reach. *See* Petition at 40a.

Further, the intrusion argument begs the question of whether Congress intended Section 110(c) to trigger a FIP obligation in the instant circumstance, since by definition all FIPs involve federal-level planning. The FIP requirement in Section 110(c) is a safety net that ensures, where a state fails to generate an adequate implementation plan, one will be prepared and adopted by EPA. In that way, the ultimate goal of the Act to provide healthful air for all citizens is preserved, regulatory gaps are filled, and no region is rewarded for avoiding its statutory obligations.

Perhaps recognizing that its general argument regarding state primacy proves too much, EPA falls back on the defense that the South Coast FIPs inappropriately intrude on local efforts **at the present time**, when state plan revisions are being

developed by the states under timetables established in the 1990 Amendments. Petition at 13. However, EPA fails to explain how this purported intrusion is so extreme that the plain language of Section 110(c) should not be enforced. [10]

In responding to this argument, the majority opinion accurately recognizes that the state can still submit, and EPA consider and approve, appropriate implementation plan revisions that take advantage of the new flexibility in the 1990 Amendments. Petition at 14a-16a. Indeed, Section 110(c) establishes this as the exclusive procedure for avoiding FIP promulgation where EPA disapproves a state plan.

Further, as the majority notes, FIP promulgation at this juncture will create a situation no different from that where a FIP has already been promulgated (as in Chicago and Arizona). Petition at 14a. EPA recognizes that if the South Coast FIPs had been promulgated before the 1990 Amendments, the SIP revisions required by the Amendments would currently be under development with that FIP in place. *See* Petition at 17. EPA has not explained how that circumstance would present the state with

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[10]It is by now well established that a court is not permitted to substitute an interpretation which differs from the plain statutory language simply because it considers another interpretation to make more sense. *Gozlon-Peretz v. United States*, 111 S. Ct. 840, 849 (1991); N.J. Singer, *Sutherland on Statutory Construction*, § 46.01 (5th ed. 1992) ("Unless the defendants can demonstrate that the natural and customary import of the statute's language is either repugnant to the general purview of the act or for some other compelling reason should be disregarded, the court must give effect to the statute's plain meaning.").

any particular difficulties or create "anomalies" in the statutory scheme.[11]

Contrary to its objections to this Court that South Coast FIPs would disrupt the state's role in clean air attainment, the FIPs that EPA actually proposed in 1990 were consciously harmonized with state and local planning. EPA's proposed FIP states:

> EPA strongly supports State and local initiatives . . . . Wherever legally permissible, EPA's own proposal relies on, builds upon, and reinforces these initiatives. In this

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[11]EPA makes much of the fact that the Amendments extend the deadlines for attainment of NAAQS, but the deadline extension was such an obvious feature of the 1990 Amendments that it provides little insight concerning Congress' intention regarding specific provisions elsewhere in the amended Act. Indeed, the new attainment deadlines actually support increased harmonization of state and federal planning, not the suspension of FIPs. Before extension of the expired 1987 deadlines, EPA arguably was obligated to adopt control measures that would provide for attainment as soon as possible. 55 Fed. Reg. 36,504 (1990). With new deadlines, the FIPs need only assist in meeting attainment for CO by 2000 and ozone by 2010. Thus, EPA has more flexibility to dovetail with local planning efforts. Further, Section 182 (e)(5) in the 1990 Amendments, which allows EPA to approve South Coast SIP provisions "which anticipate development of new control techniques" gives additional leeway to coordinate the two processes. 42 U.S.C. § 7511a(e)(5) (Supp. II 1990).

EPA also mischaracterizes its SIP disapproval rulemaking as having been based solely on failure to demonstrate attainment by 1987. Petition at 11 n.6, 16 n.9. EPA's disapproval instead notes that the SIP did not provide for attainment "by any other fixed date . . . ." 53 Fed. Reg. 1780 (1988). The lack of sufficient measures to attain NAAQS by **any** date, including the new statutory deadlines, is the "gap" that EPA now must fill.

> way, we hope to minimize federal intrusion, avoid conflict with and duplication of local efforts, and encourage speedy implementation of the measures State and local authorities wish to adopt. . . . EPA has attempted to design its FIP so as to lend maximum support to the continued development of the State plan, and to allow it eventually to supplant the federal plan in the manner intended by the framers of the Clean Air Act.

55 Fed. Reg. 36,460-61 (1990). Under the new definition of FIPs added by the 1990 Amendments, the FIP can be limited to a supportive role:

> The term "Federal implementation plan" means a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan, and which includes enforceable emissions limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.

42 U.S.C. § 7602(y) (Supp. II 1990).[12] EPA proposed in September 1990 to approve numerous state measures in tandem with its proposed FIP (55 Fed. Reg. 36,466, 36,470), and EPA appears free to finalize its approval of those state measures and

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[12]This definition represents Congress' only response to EPA's policy objections to FIPs, as set out in Administrator Reilly's letter: "[T]he legislation, as noted later, in defining the term 'Federal Implementation Plan' should remove many of the uncertainties and concerns often expressed by EPA in applying this process." H.R. Rep. No. 490, 101st Cong., 2d Sess., pt. 1, at 229 (1990).

related agency commitments now. Thus, the FIP will not need to rely **solely** on measures within federal control. Petition at 12, 23-24.

EPA's policy arguments about FIP interference with state and local planning efforts are also undermined by the fact that the FIP provision survived the 1990 Amendments in large part due to lobbying by state and local air pollution control agencies.[13] This is not surprising given that FIPs augment state efforts with federal measures.[14]

Since EPA proclaims great sensitivity to state and local concerns, and has been given new flexibility in crafting FIPs through the added FIP definition, it can be expected to plan in a cooperative and minimally disruptive manner in concert with state and local agencies. 42 U.S.C. § 7602(y) (Supp. II 1990).

In any event, policy concerns with state primacy cannot trump "the heart of the 1970 Amendments, . . . that the plan provide for attainment of the national primary ambient air quality standards in the particular State 'as expeditiously as practicable . . . .'" *Train v. NRDC*, 421 U.S. 60, 66-67 (1974);

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[13]*See, e.g.*, "Recommendations of the State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials on the Administration-Bipartisan Senate Clean Air Act Agreement," 136 Cong. Rec. S2162-65 (daily ed. March 6, 1990).

[14]In extreme cases like the South Coast, these additional measures can make the difference between an approvable implementation plan capable of attaining federal standards by the statutory deadlines and one that cannot be approved because local measures alone cannot provide sufficient controls. EPA's September 1990 rulemaking containing the proposed FIPs was recognized to have precisely this effect. 55 Fed. Reg. 36,468 (1990).

Union Elec. Co. v. EPA, 427 U.S. 246, 249 (1976).

Here, federal controls are necessary **now** for the implementation plan **ever** to work and meet the NAAQS. It was rational for Congress to continue EPA's FIP duties in this circumstance, as the plain language of Section 110(c) provides.

C. FIPs Can Be an Efficient Supplement to SIPs.

In painting FIPs as irrationally burdensome, EPA first confuses the significant costs and benefits inherent in **any** regulations sufficient to attain required air quality standards in the Los Angeles area with far less momentous questions of which agency or agencies are required by Congress to establish such regulations and when they are required respectively to act.

The burdens of air quality regulation will not be imposed on the Los Angeles region only if the FIPs are adopted; likewise, those burdens will not be eliminated if the FIPs are delayed pending state planning efforts, as EPA requests. Nearly all of the policy arguments raised by EPA (*i.e.*, that significant efforts will be required and that economic and social costs will be incurred) are equally applicable to state and federal implementation plans. Congress' decision to undertake these smog cleanup efforts is fundamental to the Clean Air Act, including the 1990 Amendments, and EPA does not dispute that a major effort will be required in the South Coast area, regardless of the outcome in this case. Petition at 12 ("Any plan to attack and solve the area's 'extreme' ozone problem . . . [will have pervasive impacts]"). The lesser questions of exactly when

and how EPA should participate in this effort simply do not have the broad, highly charged impact attributed to them by EPA.[15]

EPA also claims, without basis, that FIPs are inherently expensive and inefficient, and that federal planning will necessarily be more costly and disruptive than state planning alone. Petition at 22, 23. EPA argues that if an implementation plan is limited to measures over which it has authority, inefficiency will result because some cost-effective measures are not within EPA's power to impose. Petition at 23. Ironically, the state and local agencies have long argued the other side of the coin -- that the incremental measures within their authority are less cost-effective than certain measures available to EPA. Neither side is entirely right or wrong. Since each level of

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[15]EPA persistently emphasizes the costs of air pollution cleanup. But costs and benefits exist on both sides of the equation. Specifically, the social and economic impacts of enduring severe air pollution are staggering. One commentator compiled estimates of health and welfare costs of air pollution in the South Coast Air Basin alone, concluding:

> Social scientists have estimated that the air pollution in the Basin costs about **$8 billion a year in medical costs**, lost work time, and property damage. **Another $8 billion a year** is lost **in aesthetic damages and human discomfort**. Also, medical scientists have concluded that many premature deaths result from air pollution.

W. D. Slawson, *The Right to Protection from Air Pollution*, 59B S. Cal. L. Rev. 667, 673 (1986) (emphasis added). This grim accounting is confirmed by parallel estimates accompanying the SCAQMD's Draft 1991 Plan, which predicted that annual health benefits will be approximately $9 billion when the NAAQS are attained. SCAQMD, *Draft Final Socio-Economic Report for 1991 Air Quality Management Plan*, ES-5 (1991). A copy of this SCAQMD report is attached as Exhibit B to Appellants' Request For Judicial Notice filed with the Ninth Circuit.

government has distinct areas of authority, each has available a range of measures with differing cost-effectiveness. The most cost-effective comprehensive set of regulations can only be achieved if **all** potential measures (local, state and federal) are available for inclusion in the equation.

EPA's argument also assumes -- erroneously -- that the FIP will need to include **only** federal control requirements, rather than the combination of state and federal measures that is now permitted. *See* p.12 & n.11, *supra*; 42 U.S.C. § 7602(y) (Supp. II 1990) (FIP definition quoted at page 12 *supra*). By combining federal and state measures, the implementation plan can achieve the greatest air quality benefit using the most efficient means available at either level of government.

Finally, EPA retreats to creative, colorful depictions of an imagined South Coast FIP, suggesting that it would precipitously cut off fuel supplies to this automobile-dependent region or curtail major industrial sectors. However, it is telling that gas rationing and similarly extreme measures are absent from the FIP actually proposed by EPA in September 1990, even before the 1990 Amendments provided additional flexibility in the FIP definition. EPA's argument reflects compound speculation that draconian measures will be sought by environmentalists or others, that EPA will adopt such measures, that these will survive judicial review, that the public will passively accept them, and that Congress will not act. This Court need not address such unfounded and unlikely forecasts. EPA's FIP obligation has existed for nearly twenty years, but no gas has been rationed nor any industrial subsector shut down yet for clean air purposes.[16]

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[16]For its part, the Coalition has repeatedly objected to such suggestions and vehemently opposes gas rationing or similarly dire proposals that would undoubtedly produce a counterproductive public opinion backlash.

At base, EPA's complaints about the costs of achieving the air quality standards in the Los Angeles region openly question Congress' wisdom in requiring that those standards be met. Petition at 22. Yet there can be no doubt that the requirement to meet NAAQS has been established and that Congress was well aware of its cost when the Amendments were passed. Appendix 1 at 2a. Congress has already balanced these competing policies, and societal costs and benefits; this balance should be enforced, not disregarded as EPA urges. Even if EPA's dire projections were to come true, resort would be to Congress, not to the agency or the courts, to change the law.

D. The Plain Language of Section 110(c) Obligates EPA To Complete the South Coast FIPs.

EPA's extended presentation of flawed factual and policy arguments seems intended to divert this Court from the basic fact that this case revolves around the interpretation and application of a single subsection of the 1990 Amendments, Section 110(c)(1)(B), which provides: "The Administrator **shall** promulgate a Federal implementation plan at any time within 2 years after the Administrator -- . . . **disapproves a State implementation plan** submission in whole or in part . . . ." 42 U.S.C. § 7410(c)(1)(B) (Supp. II 1990) (emphasis added).

In taking action on the South Coast SIP, EPA employed the very term that serves to trigger Section 110(c)(1)(B), through its "disapproval" of the South Coast SIP. *See* pages 2 to 3, *supra*. Thus, the language applied by EPA when it took action on the deficient South Coast plan (of which Congress was aware) is

identical to the term Congress chose in drafting the statutory trigger for EPA's continued FIP obligation.[17]

EPA's principal argument in response is that the use of the present tense "disapproves" in Section 110(c) requires only future application of the FIP requirement, *i.e.*, after the date of the 1990 Amendments. However, EPA fails to explain the flat contradiction between this argument and the agency's contemporaneous representations to Congress in Administrator Reilly's letter. Also missing is any explanation for the lack of an express temporal limitation in Section 110(c), particularly in light of the fact that Congress **expressly** included transitional provisions elsewhere in the statute such as the one that EPA would **imply** in Section 110(c).[18]

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[17]During debates on the Amendments, EPA provided Congress with extensive background information, and specifically informed Congress of its January 1988 disapproval of the SIP submission for the South Coast: "Pursuant to [*Abramowitz*, 832 F.2d at 1079], EPA took final action to disapprove [the South Coast ozone and carbon monoxide] SIPs and to lay the groundwork for imposing the construction ban under section 110(a)(2)(I), 53 FR 1760 (Jan. 22, 1988)." 136 Cong. Rec. S2844 (daily ed. March 21, 1990). There can be no argument that EPA's FIP obligation, triggered by its 1988 SIP disapproval, was continued by Congress inadvertently. It is also illuminating that EPA's description to Congress of its South Coast disapproval regulation was stated in the infinitive "to disapprove" rather than the past tense form that EPA now insists was necessary for its mandatory FIP duty to remain enforceable.

[18]It is well established that where Congress has included limiting language in one portion of a statute, the exclusion of such language elsewhere is an indication that no limitation was intended. *See General Motors Corp. v. United States*, 496 U.S. 530 (1990) ("Since the statutory language does not expressly impose a 4-month deadline and Congress expressly included other deadlines in the statute, it seems likely that Congress acted intentionally in omitting the 4-month deadline in

EPA also does not rebut the Ninth Circuit's statement of proper grammar and usage that "the present tense is commonly used to refer to past, present, and future all at the same time." Petition at 11a.[19] Instead, EPA merely argues that the choice of tense in statutory language is important, which is undisputed, without explaining why Congress' use of the simple present tense in Section 110(c)(1)(B) should not be taken to refer to past, present and future disapprovals alike, in accordance with accepted usage. Petition at 14. EPA's failure in this regard is

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footnote continued:

§110(a)(3)(A)."); *King v. St. Vincent's Hosp.*, 112 S. Ct. 570, 586 (1991).

Congress knew how to draft limiting language when it intended to restart a date from enactment of the Amendments, and it did so repeatedly. *See, e.g.*, 42 U.S.C. § 7410(h)(1) (Supp. II 1990) ("Not later than 5 years after November 15, 1990, and every 3 years thereafter . . . ."); 42 U.S.C. § 7410(k)(1)(A) (Supp. II 1990) ("Within 9 months after November 15, 1990 . . . ."). Congress also knew how to enact "special rules" regarding such dates when it deemed it necessary. Thus, Section 187(a)(2)(B) provides: "Within 2 years after November 15, 1990, in the case of Denver, the State shall submit a revision that includes the transportation control measures as required in section 7511a(d)(1)(A) of this title . . . ." 42 U.S.C. § 7512a(a)(2)(B) (Supp. II 1990). Congress provided for specific circumstances when it wanted to but chose not to for EPA's FIP obligation in the South Coast. The phrase "disapproves a [SIP]" in Section 110(c)(1)(B) is unqualified.

[19]The rule is not reasonably subject to dispute: *See, e.g.*, Craig & Hopper, *1001 Pitfalls in English Grammar*, 3d Ed, Barrons, New York, 1986, at 34 ("RULE: Use the present tense to describe something that is true regardless of time."); Hodges & Whitten, *Harbrace College Handbook*, 9th Ed., Harcourt Brace Jovanovich, 1982, at 87 ("The present tense, for example, is by no means limited to the present time.").

critical, since it leaves the Petition unsupported at its central point.[20]

As a fallback, EPA attempts to find support in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987), which limits citizens' suits under the Clean Water Act to enforcement against polluters "in violation" of the Act. The Ninth Circuit's opinion correctly disposed of this argument. Petition at 10a-11a.[21]

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[20]While not relied upon by EPA in its Petition, the District Court committed a different, but equally critical, grammatical error when it inferred an ambiguity in the referent of the clause "disapproves a [SIP]" by assuming that Congress intended a single, exclusive referent: "The question, then, is **which** rejected SIP is the revised §110 now referring to -- the one which was rejected in 1988 or the new one which must be submitted under the new criteria and on the new time schedule [for SIP submissions under the 1990 Amendments]?" Petition at 38a (emphasis added). Yet, the phrase used by Congress is "a [SIP]". Thus, in defining **which** SIP could trigger EPA's FIP obligation, Congress used the indefinite article "a" rather than the definite article ("**the** SIP"), and Congress did not limit the referent by adjectives or attributives, such as "a new SIP" or "the 1994 SIP." As a result, there is no basis for the District Court's conclusion that Congress was referring to one and only one SIP, or to any particular SIP. The very fact that the District Court thought the provision ambiguous concerning which SIP, past or future, is referred to in Section 110(c)(1)(B) underscores that the statutory use of the simple present tense "disapproves" encompasses both.

[21]In *Gwaltney*, this Court held that a good faith allegation of a continuing rather than wholly past violation is required to maintain a Clean Water Act citizen enforcement suit. As the opinion below recognized, *Gwaltney* addresses different statutory language in a different context and therefore sheds no light on the proper interpretation of Section 110(c)(1)(B). In addition to the reasons identified by the majority opinion, the holding in *Gwaltney* is inapplicable here for several reasons. First, unlike *Gwaltney*, this is not

EPA's final concern, that its FIP was due before enactment of the 1990 Amendments, was accommodated by the Ninth Circuit's order, which directed the District Court "to establish an expeditious schedule," (Petition at 3a) not one that was unattainably retroactive,[22] or that "reduced the time for

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footnote continued:

a civil penalty case, but instead seeks to enforce EPA's mandatory duties. Second, EPA's violation (failure to promulgate a FIP) is continuing. It is not the original disapproval that constitutes the challenged violation but EPA's failure to carry out its resultant FIP obligation. Third, adopted regulations (such as SIP disapprovals) fundamentally differ from the violations of pollution control requirements addressed in *Gwaltney*. Acts of pollution, unlawful when they occurred, can be terminated before a lawsuit has been filed. *Gwaltney*, *supra*, 484 U.S. at 59-61. In contrast, once adopted, a regulation has continuing effect until amended or repealed -- a result underscored here by the Section 193 savings clause in the 1990 Amendments. Thus, the disapproval itself continues, *i.e.*, EPA, by virtue of its continuing SIP disapproval regulation, currently "disapproves" of the 1982 SIP -- or, to parallel the language of *Gwaltney*, is "in disapproval" of that SIP -- yet still fails to carry out its consequent FIP duties.

[22]EPA suggests that continuing its obligation to complete the FIPs for the South Coast Air Basin raises questions of "retroactivity." Petition at 14-15. The flaw in this argument is that the statute required FIPs both before and after the 1990 Amendments, and therefore it is not retroactive. *Sutherland*, *supra* at n.10, § 41.01 (1985) ("[A] statute is not rendered retroactive merely because the facts upon which its subsequent action depends are drawn from a time antecedent to its effective date.") EPA's duty to promulgate the FIPs was adjudicated in this very case **before** the 1990 Amendments. The only change in the statute was to **increase** the time for FIP completion, but application of a **longer** time period to act (two years after SIP disapproval rather than the six months provided prior to the Amendments) cannot possibly have surprised or prejudiced EPA. *Id.*, § 42.02.

producing a FIP to zero." Petition at 14.[23]

In sum, EPA has presented no valid support for its assertion that the use of the present tense "disapproves" limits application of Section 110(c) to disapprovals occurring after the 1990 Amendments. The Ninth Circuit is correct that common usage dictates the opposite conclusion.

E. All of the Legislative History of Section 110(c) Is Contrary to EPA's Litigation Position.

In ruling that EPA's obligation to complete the South Coast FIPs continued after the 1990 Amendments, the Ninth Circuit simply came to the same conclusion as had EPA Administrator Reilly regarding the plain meaning of the language adopted by Congress: Mr. Reilly told Congress that the language would compel EPA to complete the FIPs for the South Coast Air Basin.

The Administrator's letter is useful legislative history for two important reasons. First, it is a direct admission by EPA of what the "plain language" says. Second, it underscores Congress' clear intent in adopting the current language of Section 110(c): Having been told by EPA that such adoption would continue EPA's obligation to complete the ongoing South Coast FIP

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[23]EPA's second fallback, that a FIP could not have been triggered under one of the provisions of Section 110(c)(1)(A) prior to passage of the 1990 Amendments, is a red herring. The Coalition has never argued that this trigger has occurred. Further, that one of three distinct triggers in Section 110(c) is on its face prospective hardly demonstrates Congressional intent to make the other, temporally unqualified triggers prospective as well. The majority correctly disposed of this issue, applying the triggers separately since they are disjunctively referenced. Petition at 10a - 12a.

process, Congress plainly acted intending just that result.[24] Administrator Reilly's interpretation of Section 110(c) as preserving both existing and future FIP obligations is exactly the opposite of EPA's position in this litigation and severely undercuts the credibility of the latter position, transparently formulated to convince the judiciary to undo what Congress did.

Other supportive legislative history is presented in the Opinion below, including the statements of Senators Chafee and Baucus.[25] Petition at 16a-19a. No legislative history supports EPA's position.[26]

F. EPA's Arguments Also Ignore or Misapply Established Rules of Statutory Construction.

EPA's arguments depend upon the assertion that the 1990 Amendments eliminated all applicable pre-Amendment requirements, replacing them with an entirely new statutory scheme. This is by no means the case; the 1990 Amendments preserved nearly all of the key substantive provisions of the former Act. The basic structure of the Act was unaffected, with

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[24]Implicitly, EPA now argues that it was "crying wolf" to Congress, exaggerating the impact of Section 110(c). Petition at 20. This assertion is not only disingenuous but does not counter the fact that Congress, being advised by EPA that the FIPs would be required, approved of that result and left the proverbial wolf at EPA's door.

[25]Contrary to EPA's claim that the majority simply dismissed these statements, it is clear that the majority evaluated them and concluded that they do not support EPA's interpretation. Petition at 17a.

[26]EPA's repeated reliance on the legislative history of the 1977 Amendments (Petition at 3, 4, 24) is particularly off point, since that legislative history sheds little if any light on the intended meaning of specific provisions of the 1990 Amendments passed some 13 years later.

implementation plans being required to provide for NAAQS attainment by statutory deadlines. That the 1990 Amendments extended the deadlines does not affect this basic structure.

EPA wants to deny the obvious, that the 1990 Amendments were simply a second "mid-course correction" to a program first developed by Congress in 1970. By this artifice, EPA attempts to avoid the basic rule of construction that applies: "Provisions of the original act or section which are repeated in the body of the amendment, either in the same or equivalent words, are considered a continuation of the original law." *Sutherland, supra* at n.10, § 22.33 (1985).[27]

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[27]Repeatedly, EPA inaccurately describes the effect of the Amendments on the former statute using such extreme terms as "repealed," "eliminated," "replaced with new provisions that do not preserve any element of the State's prior failures," "[having mooted] the State's original failure," etc. Petition at 8, 11 & n.6, 19. However, Section 110(c) was amended, not repealed. *Sutherland, supra* at n.10, § 23.02. As described by Congress, the Amendments continued the existing clean air program without radical change: "Fundamentally, title I is a continuation of what is already required in current law -- that all areas attain National Ambient Air Quality Standards (NAAQS)." House Report, *supra* at n.12, 165. Even Judge Noonan's dissent recognized that "[t]he new statute is certainly comparable . . . ." and District Court Judge Hupp observed that "§ 110 was left virtually and ambiguously untouched . . . ." Petition at 29a, 41a. Prior to amendment of Section 110(c)(1)(B), EPA's FIP obligation was triggered by a finding that the SIP was not "in accordance with the requirements of this section." 1970 Clean Air Amendments ("CAA"), Pub. L. No. 91-604, §110(c)(2), 84 Stat. 1676, 1681-82 (1970) (renumbered 1977, amended 1990). In 1990, Congress changed the language to require FIP promulgation after EPA "disapproves a [SIP]". 42 U.S.C. § 7410(c)(1)(B) (Supp. II 1990). The language is equivalent because EPA approval of a SIP was mandatory if Section 110 requirements were met; as a corollary, disapproval required a finding that the SIP did not meet the requirements of the Act. CAA § 110(a)(2), 84 Stat. at 1680-81 (amended 1990).

The FIP provision of Section 110(c) was present in the original Clean Air Act and has been continued in substantially the same form through the two major amendments in 1977 and 1990. Even EPA, in note 1 of its rehearing petition to the Ninth Circuit, recognized that "The language of this particular directive was not changed by the 1990 Amendments . . . ." Applying the rule of construction cited above, Section 110(c) must be treated as a continuation of the pre-Amendment law. EPA has **never** addressed this rule of construction, presumably because the rule cleanly disposes of EPA's indirect and inferential arguments.[28]

Also, by arguing that changes elsewhere in the 1990 Amendments (specifically the attainment deadline extensions) implicitly limit the unqualified FIP triggers in Section 110(c), EPA's Petition also runs afoul of the rule of construction disfavoring implied repeal of statutes. *Sutherland*, *supra* at n.10, § 23.09 (1985). Similarly, EPA's argument that the implementing policy of the statute to promote state planning primacy overrides (or renders ambiguous) the plain language of Section 110(c) turns the applicable rule of construction on its head. *Id.*, § 20.12. EPA's failure to apply these established rules of construction should not be condoned.

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[28]The Ninth Circuit's decision is consistent with other decisions addressing minor amendments to statutes in the context of a statutory timetable. *See, e.g., Trichilo v. Secretary of Health & Human Serv.*, 823 F.2d 702, 706 (2d Cir. 1987) (rejecting the argument that the 1985 amendments to EAJA restarted the clock for calculating a cost of living adjustment); *Ramon-Sepulveda v. INS*, 863 F.2d 1458, 1463-64 (9th Cir. 1988); *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 522 (1st Cir. 1987).

G. EPA's Suggested Expansion of *Chevron* Is Unwise, Unsupported and Should Be Rejected.

Lacking direct arguments of substance, EPA retreats to the *Chevron* doctrine, arguing that its view of the scope of its mandatory FIP duties should be given deference. Yet EPA has identified no true conflict between the result below and the decisions in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), and its progeny *Arkansas v. Oklahoma*, 112 S. Ct. 1046 (1992), and *Rust v. Sullivan*, 111 S. Ct. 1759 (1991).[29] The majority opinion below, and *Environmental Council*, *supra* at n.9, fully complied with *Chevron* by applying the plain meaning rule and, secondarily, by acknowledging Administrator Reilly's letter as the agency's true contemporaneous construction of the statute.[30]

By applying *Chevron* at all, the majority opinion in fact expanded the scope of the *Chevron* doctrine from the delegation

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[29]These cases hold that where Congress has left a gap for an agency to fill, and the agency's interpretation of the statute (embodied in regulation) is a permissible one, the Court will then defer to that interpretation. However, where Congress has mandated that EPA take action, no gap is left for discretionary administrative interpretation. Moreover, EPA has not embodied its interpretation of Section 110(c) in any regulation. Notably, its contemporaneous interpretation of the statutory language, set forth in Administrator Reilly's letter discussed above, conflicts with its litigation posturing here.

[30]It bears emphasis that the Arizona Federal Register notice (discussed *supra* at n.6) that EPA claims deserves deference (Petition at 19) was not even cited to the Ninth Circuit as EPA's contemporaneous construction of the statute until EPA's petition for rehearing, thus explaining the majority's failure to discuss it. Apart from the fact that such late-presented arguments generally should be disregarded, the timing of the argument confirms that EPA's reliance on the Arizona notice is simply a *post hoc* rationalization for litigation purposes rather than a true official or formal interpretation.

context, in which it was developed, to a mandatory duty context, in which it has never been applied.[31] In *Chevron*, the Supreme Court found that Congress had left a gap for EPA to fill through rulemaking on the technical definition of "stationary source" under the Clean Air Act, and that EPA's regulations filling that gap were within the permissible range of discretion intended by Congress. *Chevron* held that where a statute included a broad definition, the very breadth of the definition implied a delegation to the agency to fill the gap in a manner consistent with the goals and purposes of the statute. Here, however, we face a broad **mandatory** duty that is triggered by **all** SIP disapprovals; there is no implied delegation such as the one that served as the basis for the *Chevron* decision. Where Congress establishes a broad mandate, EPA lacks discretion to pick and choose among the duties so mandated; it must comply with all mandates of Section 110(c) without limitation.[32] Expanding *Chevron* to create a rule implying agency discretion to avoid statutorily prescribed mandatory duties would seriously risk misapplying Congressional directives.

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[31]The dissent below also misapplied *Chevron* by doing just what *Chevron* proscribes -- applying the Court's view of proper policy or sensible result to override the plain meaning of the statute.

[32]Similar to the limitations on *Chevron* suggested by Justice Scalia in the dissent in *Crandon v. United States*, 494 U.S. 152, 177 (1989), the interpretation and enforcement of EPA's mandatory duties are judicial, not administrative, functions. EPA's views of the scope of its mandatory duties are not entitled to deference under *Chevron* since EPA is not charged by Congress with interpreting the scope of those duties. The concerns expressed by Justices White, Blackmun and Thomas about applying *Chevron* to the "*post hoc* rationalization of government lawyers" are similarly applicable here. *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1405 (1992) (White, J., dissenting).

H. The Section 193 Savings Clause Provides an Alternative Ground for Affirming the Decision.

Even if EPA were correct concerning the proper interpretation of Section 110(c), the Section 193 savings clause, 42 U.S.C. § 7515 (Supp. II 1990), was designed to preserve the benefits of settlement agreements such as the one in this case and to prevent backsliding in ongoing efforts to improve air quality. Because the majority below found that the language of Section 110(c) continued EPA's FIP obligations, it did not address the effect of Section 193 in its opinion. Petition at 8a. However, this savings clause provides an alternative (and more than sufficient) basis for upholding the decision below.

The savings clause precludes modification of any "control requirement . . . required to be adopted by . . . an order [or] settlement agreement . . . unless the modification insures equivalent or greater emission reductions . . . ." The settlement agreement herein obligated EPA to adopt "control requirements" as the central element of the South Coast FIP, as plainly evidenced by the requirements EPA included in its proposed FIP. *See* n.7, *supra*. Indeed, EPA bases its policy arguments concerning Section 110(c) on a parade of horribles resulting from the control requirements that it claims would be needed in the FIP. At a minimum, Section 193 saves the control requirements that were "required to be adopted by . . . [the] settlement agreement" herein, in effect at the passage of the 1990 Amendments. The savings clause thus provides an alternative basis for affirming the decision below.[33]

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[33]The savings clause issue occupied a significant portion of the briefing to the Court of Appeals, and complete presentation of the issue is of necessity beyond the scope of this opposition.

I. There Is No Actual or Potential Conflict of Decisions That Requires Correction by this Court, but a Grant of Certiorari Would Create a Conflict of Decisions.

EPA concedes that "the particular legal question presented in this case is of limited scope and of a non-recurring nature." Petition at 26. The narrow legal question presented here is whether EPA disapprovals of SIPs prior to the 1990 Amendments were intended by Congress to trigger a federal planning obligation under amended Section 110(c). Obviously, all such disapprovals have already occurred. Therefore, the legal effect of the decision has quite restricted application, as EPA acknowledges. Only three areas of California have disapproved SIPs: the South Coast and Sacramento and Ventura Counties, both subjects of citizen suits parallel to this case.[34] These latter two are the **only** other cases that could be affected by the outcome here.[35] As a result, this case presents no broad precedential questions that might warrant review by this Court.

On the other hand, since EPA's request to be relieved of its federal planning obligation for Arizona areas in *Delaney* was denied by the Ninth Circuit, permitting EPA to avoid its duties in the South Coast would create a direct intra-circuit conflict with that decision. Since EPA sought and was denied certiorari in that case shortly after the 1990 Amendments, the creation of

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[34]Similarly, the Section 193 savings clause issues are temporally limited. All of the California cases were the subject of parallel settlement agreements when the 1990 Amendments were passed. No new cases can arise under the savings clause because it requires a settlement agreement and/or order in effect at the time of the Amendments. Petition at 47a.

[35]EPA has cited no other decisions on this issue in any other circuit or district court, and the Coalition knows of none. Nor are there other pending or potential cases raising the question.

such a conflict could not be remedied.

Thus, while there is no conflict of decisions to be resolved by the Supreme Court, a grant of certiorari herein would risk **creating** such a conflict.

CONCLUSION

For the foregoing reasons, EPA's petition for a writ of certiorari should be denied.[36]

Respectfully submitted,

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December 9, 1992

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[36]EPA's suggestion that the matter is appropriate for summary reversal is entirely inappropriate for a variety of reasons. In addition to the correctness of the decision below, EPA's proposed expansion of the *Chevron* decision alone would warrant full briefing and argument. Again, other than the necessarily brief discussion above, the Section 193 savings clause issue has not been briefed or argued to this Court. More generally, interpretation of a complex Congressional enactment such as the 1990 Amendments is not properly the subject of a summary reversal.

APPENDIX 1

The letter from Administrator Reilly to House Speaker Foley, printed at 136 Cong. Rec. H2771, H2886-88 (daily ed. May 23, 1990), reads in pertinent part as follows:

The White House
Washington, D.C.

May 22, 1990

Hon. Thomas S. Foley,
Speaker, U.S. House of Representatives
Washington, D.C.

Dear Mr. Speaker:

As the full House prepares to consider H.R. 3030, the clean air bill which has been reported by the Committee on Energy and Commerce, we would like to offer the Administration's views on both the bill as reported by the Committee and several likely amendments.

The Administration's goal is to secure passage of clean air legislation which obtains the urgently needed environmental benefits called for in the President's original bill in the most efficient and cost-effective manner possible. We are pleased that the bill incorporates many of the features which were included in the President's proposal for the purpose of achieving this goal.

We are particularly pleased that the bill contains the following central features:

. . .

Provisions designed to bring the overwhelming majority of America's cities into attainment with standards for ozone, carbon monoxide, and particulate matter within 10 years; and provisions suggested by the President to ensure steady progress toward attainment by requiring annual percentage reductions in ozone-forming emissions.

We do, however, have several concerns with the Committee bill and with several amendments that may be offered on the House floor.

On January 19th, the President sent a letter to the leadership of the Senate outlining five minimum tests of balance and reasonableness that must be met in any Clean Air legislation which he would sign. Specifically, the President believes that:

The environmental protections in the Administration's bill must be maintained and preserved over time;

The bill should not impose aggregate cost on the economy which exceed those embodied in the Administration's bill by more than 10 percent;

Controls in the bill should achieve reductions in the most cost effective way;

The system of acid rain emissions trading must be preserved and allowed to work; and

The legislation must not include a national electricity tax to pay for controls.

The estimated cost of the Committee bill is already at or slightly above the cost threshold outlined in the President's letter.

Certain amendments could, if adopted, cause the bill to violate this and several other of the President's tests. These amendments are discussed below. Several additional concerns that the Administration has with the Committee bill as reported are discussed in the attachment.

. . .

CONCLUSIONS

The Administration, the House, and the Senate have all devoted a remarkable amount of time to consideration of clean air legislation during the current Congress. We believe that the outlines of a consensus bill that affords significantly increased environmental protection in a cost effective manner are clear.

We now have an opportunity to break a decade-long logjam on clean air. The Administration believes that the House should seize this unique opportunity, and avoid the adoption of any unnecessarily costly amendments which provide little incremental environmental benefit.

We urge Members of the House to support a bill which meets the President's five tests of balance and reasonableness so that clean air legislation can be signed at the earliest opportunity this year.

Thank you very much for your consideration.

Sincerely,

William K. Reilly
Administrator, Environmental Protection Agency
John H. Sununu,
Chief of Staff

ATTACHMENT-KEY ADMINISTRATION CONCERNS WITH COMMITTEE BILL AS REPORTED

FIP'S - The House has delegated language that relieved EPA of its current obligations to complete federal implementation plans (FIP's). If current FIP obligations are not relieved, EPA must impose across-the-board draconian measures devastating the country's largest industrial area. In light of the new regime for state plan submissions, it makes no sense for EPA to impose FIPs before the states have had a chance to meet their new obligations. For these reasons, the Administration strongly objects to the Committee's approach.

In addition to current FIP obligations, the House Committee bill requires EPA to promulgate comprehensive FIPs in the future, regardless of how unworkable such federal measures would be or how impracticable it would be for EPA to implement the FIP. This requirement ignores the dismal history of the current attainment-FIP requirement, including the public uproar and virtual collapse of Title I of the Act that resulted from previous FIPs. It would be counterproductive to signal in this new law that states can avoid their new obligations by simply delaying and waiting for EPA to impose the necessary controls. As in the past, attainment FIPs would be an excuse for state inaction and an albatross around EPA's neck. It would be more responsible for the law to recognize the limitations EPA faces in this area and either allow partial FIPs on a discretionary basis or, as in the Senate bill, mandate only partial FIPs that would assure progress toward attainment.

. . .

APPENDIX 2

The colloquy between Senators Wilson and Chafee, at 136 Cong. Rec. S17,237 (daily ed. Oct. 26, 1990) reads as follows:

Mr. WILSON. I have another concern regarding the "General Savings Clause" which was section 193 of title I of the House bill, and the effect that it could have on California's flexibility to develop its own plan to meet the new requirements of the act. EPA, pursuant to a court settlement, has proposed a federal implementation plan, or FIP, for the Los Angeles area, and has agreed to do similar plans for four other areas of California. The proposed FIP for Los Angeles is a complete plan which includes some questionable federally imposed control measures, such as a 90-percent across the board reduction to all sources regardless of technological or economical feasibility. I am concerned, and I know officials at EPA are concerned, that some might interpret the savings clause as a requirement that EPA finalize its Federal plan and preempt ongoing State and regional air quality planning which would otherwise be required under this bill.

I want to make sure that this bill does not lock us into a virtual Federal takeover of air quality planning in most of the urban areas of California. A takeover that might occur before State and local agencies even have the opportunity to implement the provisions of this act. I am sure that the Senator will agree with me that this was not the intent of the conference committee agreement on this point?

Mr. CHAFEE. The savings provision was intended to ensure that there is no backsliding on the implementation of adopted and currently feasible measures that EPA has approved as part of a State implementation plan in the past, or that EPA has added to State plans on its own initiative or pursuant to a

court order or settlement. The situation you describe goes beyond that intent and would, I agree, create an unfair situation. If EPA were to promulgate complete new plans based on requirements of the old act, the areas subject to those Federal plans would be deprived of the opportunity to utilize the significantly revised and clearly more workable requirements of the revised act. This would be unreasonable, and clearly not our intent.

EPA has been provided significant discretion in applying the savings provision as it relates to FIP's in California. EPA has the obligation, as I discussed earlier, to adopt control measure for sources which it exclusively controls when these controls are necessary to attain national standards and meet other requirements of this act. Beyond that, EPA should complete ongoing FIP processes only for the purposes I have stated above.

Supreme Court, U.S.
FILED
DEC. 18 1992
OFFICE OF THE CLERK

No. 92-798

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, PETITIONERS,

v.

COALITION FOR CLEAN AIR, INC., *et al.*, RESPONDENTS

On Petition For A Writ Of Certiorari To the United States Court Of Appeals For The Ninth Circuit

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OPPOSITION TO MOTION TO FILE BRIEF *AMICUS CURIAE*

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TABLE OF AUTHORITIES

STATUTES AND REGULATIONS

Clean Air Act, 42 U.S.C. § 7401 *et seq.*:

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-798

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, PETITIONERS,

v.

COALITION FOR CLEAN AIR, INC., *et al.*, RESPONDENTS

On Petition For A Writ Of Certiorari To the United States Court Of Appeals For The Ninth Circuit

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OPPOSITION TO MOTION TO FILE BRIEF *AMICUS CURIAE*

The Coalition for Clean Air and Sierra Club (jointly, the "Coalition")[1] oppose the motion for leave to file a brief *amicus curiae* filed by the law firm of Latham & Watkins, counsel for Respondent Southern California Edison Company in these proceedings, on behalf of the Los Angeles Area Chamber of Commerce ("Chamber").

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[1]Respondents Coalition for Clean Air and Sierra Club are not-for-profit corporations that do not have publicly traded stock, or parent or subsidiary corporations. Sup. Ct. R. 29.1.

Southern California Edison Company ("Edison"), a major utility company in the Southern California area and a party to the proceedings below, which we are informed is a member of the Chamber, elected not to file a brief in support of the Environmental Protection Agency's ("EPA") petition for writ of certiorari within the twenty day period required under Supreme Court Rule 12.4. Instead, after the Coalition's brief had been dispatched to the printer,[2] the Coalition was informed that the Chamber, represented by the same law firm as Edison, intended to file a brief on behalf of its members, including Edison. The practical effect of this approach was to prevent the Coalition from addressing in the brief in opposition the points made by Southern California industrial interests, including Edison. For that reason, this opposition is being filed.

Moreover, the Chamber presents essentially the same arguments as does EPA regarding the potential impacts of air quality regulation on the Southern California economy. Not surprisingly, the Chamber's brief suffers from the same fundamental flaws as does EPA's. First, the Chamber assumes without providing any direct support that partial federal planning will be more expensive and less efficient than planning based solely on state and local authorities. Indeed, the South Coast Air Quality Management District has provided clear evidence to the contrary in its brief in opposition -- that the **least** costly set of regulations will need to include federal measures. Pure argument, rather than citation to evidence, by EPA, the Chamber, and by the Southern California Association of

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[2]The Coalition was informed the afternoon of Friday, December 4 that the Chamber intended to file its brief the next Monday. No previous notice had been provided and the Coalition had relied upon Edison's failure to file a supporting brief within the twenty day period in selecting the issues to present in its opposition.

Governments ("SCAG"),[3] does not support the proposition that the federal implementation plan ("FIP") will be inefficient.

Second, as with EPA and SCAG, the Chamber assumes that the FIP will need to be complete in and of itself, rather than filling gaps and building upon the state plan that has already been submitted to EPA. This argument ignores the added flexibility built into the definition of FIPs by the 1990 Amendments, as well as the nature of the FIP that EPA actually proposed in September, 1990. 42 U.S.C. § 7602(y) (Supp. II 1990); 55 Fed. Reg. 36,458 (1990):

> The term "Federal implementation plan" means a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan, and which includes enforceable emissions limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.

The Chamber's repeated reference to "two layers of environmental regulations" and "an across-the-board strategy . . . adopted *in addition* to existing state and local standards" is a straw man. Chamber Brief at 3, 6, 9 (emphasis in original). Under the new FIP definition, EPA clearly does not need to include controls already included in the state plan, and the FIP

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[3]The Southern California Association of Governments, party to the proceedings below, filed a second petition for writ of certiorari in this case, rather than filing a brief in support of EPA's petition within the twenty day period under Rule 12.4. In order to move this matter forward, the Coalition's opposition to SCAG's petition is being filed this same date.

can be partial and supportive, rather than complete in and of itself.

Similarly, the Chamber's argument that the federal plan will be required before state planning efforts can take place ignores the fact that a state plan has already been submitted and is presently pending before the EPA. 55 Fed. Reg. 36,458 (1990). EPA proposed to approve the control measures in this state plan in September, 1990, but has not yet finalized that action. *Id.* The Chamber's suggestion (Chamber Brief at 7), that EPA can or should ignore this pending state plan submission until 1994 when additional matters must be addressed, inappropriately seeks to continue the implementation plan gap in the South Coast that underlies this action. The 1994 deadline for additional state plan submissions under the 1990 Amendments is an outside limit and there is absolutely no support in the statute for the suggestion that presently pending state plan submissions should be ignored until that date.

The Chamber's concern that the FIP will be hastily developed (Chamber Brief at 8) ignores the role of the District Court in setting an appropriate schedule, and the mutual interest of all parties, including the Coalition, that EPA be given sufficient time to develop an efficient, well documented and appropriate plan based upon full public participation. The Chamber's suggestions to the contrary are pure speculation.

Also speculative and incorrect is the Chamber's suggestion that EPA's direct FIP regulations will be less susceptible to change than comparable state-initiated implementation plan provisions. Chamber Brief at 8. However, once approved by EPA as part of an implementation plan, state measures can only be changed or removed through a subsequent EPA rulemaking or order -- just the same as with federally-adopted measures. 42

U.S.C. §§ 7410(i), 7602(q) (Supp. II 1990). Adopted state implementation plan provisions are no more or less flexible than federal implementation plan requirements. In fact, EPA's proposed FIP primarily contained measures that, "would be rescinded or their requirements lessened if State and local efforts suffice . . . ," making clear that obsolete measures would not be retained. 55 Fed. Reg. at 36,500 (1990).

Finally, the nature of the Chamber's arguments illustrates that this is fundamentally a political matter that was resolved by Congress in the 1990 Amendments through the compromise language selected in Section 110(c), continuing EPA's FIP obligations where SIP disapproval occurs, but relaxing the requirements of the FIP through the new FIP definition. The only appropriate lobbying, however, was that lobbying directed to Congress, and the Chamber's lobbying efforts before this Court should be disregarded.

Respectfully submitted,

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OCTOBER TERM, 1992

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Petitioners,
vs.
COALITION FOR CLEAN AIR, INC., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did enactment of the 1990 Amendments to the Clean Air Act, 42 U.S.C. §7401 *et seq.*, continue EPA's preexisting obligation to complete federal implementation plans for the South Coast Air Basin to supplement pollution control efforts of state and local governments, given that more than twenty years of state and local air quality planning efforts have led to the conclusion that attainment of the National Ambient Air Quality Standards can only be achieved with the assistance of federal measures?

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In The
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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent South Coast Air Quality Management District ("SCAQMD") urges that the Environmental Protection Agency's ("EPA") Petition for Writ of Certiorari ("Petition") be denied. The Ninth Circuit Court of Appeals correctly held that EPA is obligated to complete Federal Implementation Plans ("FIPs") for California's South Coast Air Basin.

STATEMENT OF THE CASE

The SCAQMD incorporates the statement of facts and historical background set forth by the Court of Appeals, Petition at 2a-8a, and the Statement of the Case presented in the Brief in Opposition to EPA's Petition filed

by Respondents Coalition for Clean Air and Sierra Club ("Coalition Brief"). Coalition Brief at 2-8. The following statement clarifies key points.

The South Coast Air Quality Management District ("SCAQMD") intervened in this action in 1988 in order to assure that any FIPs promulgated by EPA would be supportive of the District's efforts to achieve clean air. Under California law, the SCAQMD is the "sole and exclusive agency within the South Coast Air Basin with the responsibility for comprehensive air pollution control," and has "the duty to represent the citizens of the basin in influencing the decisions of other public . . . agencies . . . ." whose actions might affect air quality. Calif. Health & Saf. Code §40412. The SCAQMD is responsible for adopting a plan to achieve and maintain the national ambient air quality standards ("NAAQS") in the South Coast Air Basin. Calif. Health & Saf. Code §40460(a). The SCAQMD's plan is to form a portion of the State Implementation Plan ("SIP") required by the federal Clean Air Act. Calif. Health & Saf. Code §40469.

EPA's obligation to prepare FIPs for the South Coast Air Basin arose from its disapproval, pursuant to court order in *Abramowitz v. EPA*, 832 F.2d 1071 (9th Cir. 1987), of the 1982 state implementation plan for the South Coast Air Basin. Plaintiffs Coalition for Clean Air and Sierra Club thereafter filed this action which resulted in the settlement agreement and March 28, 1989 order requiring EPA to adopt FIPs for the South Coast Air Basin. EPA proposed ozone and CO FIPs for the South Coast in 1990. Soon after the 1990 Amendments to the Clean Air Act, 42 U.S.C. §7401 *et seq.* (Supp. II, 1990) were signed, EPA moved to vacate the order and settlement agreement requiring promulgation of the FIPs.

The SCAQMD opposed EPA's motion because adoption of federal emission control measures such as those which could be included in a FIP will be necessary in order for the South Coast Air Basin to attain the NAAQS for ozone. Significant quantities of volatile organic compounds and oxides of nitrogen — which react in the atmosphere to form ozone — are emitted by sources which are not subject to the regulatory jurisdiction of state or local agencies. Such sources, which include aircraft, new locomotives and certain nonroad vehicles, are subject to EPA regulatory jurisdiction. Without federal emission control requirements applicable to such sources, the South Coast Air Basin cannot attain the NAAQS for ozone even if all other feasible control measures are implemented. Appendix attached hereto at A1-A11. (Declaration of Barry Wallerstein, Excerpts of Record at 64-76, *Coalition for Clean Air, et al. v. EPA*, 971 F.2d 219 (9th Cir. 1991) (Nos. 91-55383, 91-55386, 91-55634)).

The need for FIPs in the South Coast is a function of the severe air pollution problem facing this area. The South Coast Air Basin includes Orange County and the nondesert portions of Los Angeles, Riverside and San Bernardino Counties — an area of 10,000 square miles with a population of over 12 million people. Because of adverse meteorology, topography and high population levels, the South Coast Air Basin has by far the worst ozone and nitrogen dioxide levels in the United States, and among the worst particulate matter and carbon monoxide ("CO") levels of any urbanized area in the country. The severity and frequency of exceedances of the NAAQS and the size of the exposed population make air quality in the South Coast Air Basin one of the nation's most serious environmental and public health problems. 55 Fed.Reg. 36464 (1990).

Due to the severity of air pollution in the South Coast, stringent control measures applicable to virtually every emission source will be necessary to attain the NAAQS. This is demonstrated by the region's Air Quality Management Plan ("AQMP"). On March 17, 1989, the District adopted a revision to the AQMP for the South Coast Air Basin which, after approval by the California Air Resources Board ("ARB"), was submitted to EPA on August 18, 1989 as a proposed revision to California's SIP. The AQMP projects attainment of the CO standard in 2000 and the ozone standard in 2010. The AQMP is a highly ambitious program of unprecedented scope which includes detailed descriptions and adoption schedules for over 140 control measures that are classified into three tiers. Tier I includes regulations that the SCAQMD can adopt and begin to implement in the near term using technology that, for the most part, is available currently. Under these regulations, the SCAQMD would stringently control emissions created by industry and commerce. The Southern California Association of Governments would coordinate a far-reaching transportation and land-use management program and the ARB would require further reductions in emissions from consumer products and mobile sources. In addition, as discussed below, the AQMP proposes that the federal government control emissions from certain sources subject to its exclusive jurisdiction.

The AQMP would accomplish the remaining emission reductions, roughly one-half of the total, through regulations designed to create incentives for development of new emission control technologies. "Tier II" measures scheduled for adoption by 1998 would force significant advances in technology, such as significantly reformulated solvents and coatings. Tier III requirements, which would be fully implemented by 2010, rely upon major

technological breakthroughs to eliminate nearly *all* emissions from solvents, coatings, and motor vehicles.

The AQMP includes every conceivable control measure which the District staff determined could feasibly be implemented given today's technology and potential technological breakthroughs by the year 2007. EPA has acknowledged that the SCAQMD is the largest, best funded, and most sophisticated agency of its kind. 55 Fed.Reg. 36460 (1990). Despite inclusion of all feasible measures, the AQMP cannot achieve attainment of the NAAQS for ozone unless control measures applicable to sources under exclusive federal jurisdiction are implemented as proposed in the plan. Appendix at A6-A7.

While the SCAQMD opposed EPA's effort to vacate the FIP requirement, the District did not oppose EPA's alternative request to the District Court in this action to extend the deadline for promulgation of the subject FIPs. We believe that EPA will need additional time to determine the specific form of FIPs required by the 1990 Amendments, to evaluate the latest air quality and other relevant data, and to propose efficient and effective FIPs. We believe that the FIPs proposed by EPA for the South Coast in 1990 can and should be improved in numerous respects.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Summary of Argument

EPA's Petition for Writ of Certiorari should be denied for the following reasons:

1. EPA concedes that the issue presented herein, *i.e.*, whether or not EPA's preexisting duty to promulgate FIPs in California is retained under the 1990 Amendments, will not recur. Petition at 26.

2. EPA also concedes that the issue presented herein is limited to three pending cases, all of which are in the Ninth Circuit. *Id.* There is no conflict among decisions of the circuit courts regarding this issue.

3. EPA's position that this case presents an important question warranting Supreme Court review consists entirely of two policy arguments regarding the practical effects of FIPs on state air quality planning and on sources of pollution. These policy arguments are not meritorious for two reasons: First, they were presented to Congress prior to enactment of the 1990 Amendments as support for EPA's effort to delete language ultimately enacted as part of Section 110(c), an effort which was *rejected* by Congress, and, second, they are directly controverted by EPA's own actions in proposing FIPs for the South Coast in 1990.

EPA's first policy argument is that the Ninth Circuit decision has precluded the federal agency from giving the state and local authorities the opportunity to make the first attempt to assemble the mix of pollution controls they believe are appropriate to achieve the emission reductions necessary — an opportunity they otherwise would have had under the 1990 Amendments. Petition

at 11. This argument is not meritorious because the state has already adopted a plan which has been under development for over a decade and which demonstrates the need for certain federal control measures to supplement state and local requirements. Moreover, as is discussed below, EPA's 1990 FIP proposals demonstrate that FIPs can be carefully tailored to preserve the state's primary planning role and initial opportunity to determine the appropriate mix of air pollution controls.

The 1990 FIPs proposed to accomplish this through two means: First, the FIP proposals were tied to a proposed action by EPA to approve portions of the state implementation plan ("SIP") previously submitted for the South Coast. Since, under the 1990 Amendments, a FIP is used to "fill the gaps" in a deficient state plan, §302(y), 42 U.S.C. §7602(y) (Supp. II, 1990), EPA was able to reduce the scope of the FIPs by approving portions of the state plan. Second, the measures which would be most difficult and costly for emission sources to implement were proposed in the FIPs solely as "backstop" measures, *i.e.*, measures to be implemented only if state and local governments fail to achieve emission reductions adequate to maintain reasonable progress towards attaining the ambient air quality standards. None of the "extreme" measures which EPA claims may have to be included in a FIP (Petition at 24) were proposed to be implemented absent such a failure by the state to exercise its initial opportunity to determine and implement emission controls adequate to attain clean air standards by the same deadlines stated in the 1990 Amendments. 55 Fed.Reg. 36362 (1990).

EPA's second policy argument in support of its Petition is that FIPs are inefficient and costly compared to implementation plans prepared by state and local governments. This argument is incorrect because many

significant emission sources are beyond the scope of state and local regulatory jurisdiction. Regulation of such sources, which include aircraft, new locomotives and other nonroad vehicles, will be essential for the South Coast Air Basin to attain air quality standards. Appendix at A5-A8. The inability of state and local governments to adequately regulate these sources is a major "gap" in the SIP for the South Coast which can be filled by federal measures adopted as part of a FIP. Absent such federal regulations, state and local authorities will be required to impose severe and probably impossible control burdens on sources subject to state and local jurisdiction. FIPs could spread these regulatory burdens across a wider class of sources and thereby minimize economic impacts.

Finally, EPA's position conflicts with congressional intent to build upon past air pollution control efforts, rather than commencing the air quality planning and control process anew, and conflicts with the general savings clause of the 1990 Amendments. §193, 42 U.S.C. §7515 (Supp. II, 1990). The legislative history for the savings clause states that EPA is obligated to "complete ongoing FIP processes" for the purposes of "ensuring that the standards are met by the statutory deadlines" and that "EPA has the obligation to adopt control measures for sources which it exclusively controls when those controls are necessary to help attain national standards . . . ." 136 Cong.Rec. S.16970 (Daily Ed. Oct. 27, 1990).

B. Argument

1. Introduction

The SCAQMD supports the arguments regarding the proper interpretation of Section 110(c) of the Clean Air Act, 42 U.S.C. §7410c (Supp. II, 1990), stated by Respondents Coalition for Clean Air and Sierra Club in their Brief in Opposition to EPA's Petition. As is described in the Coalition Brief, Section 110(c) was not materially altered by the 1990 Amendments and, therefore, preexisting FIP obligations were not vitiated. Moreover, EPA's contemporaneous interpretation of Section 110(c) and representation to Congress in a letter from EPA Administrator William Reilly to House of Representatives Speaker Foley prior to passage of the 1990 Amendments should be accorded greater weight than the contrary interpretation subsequently stated by EPA during the pendency of this litigation. See Coalition Brief at 4-5.

The above-described arguments in the Coalition Brief will not be repeated here. We will, instead, explain in this brief why EPA's policy arguments regarding the practical effects of FIPs are unfounded. In addition, we will explain why the Section 193 Savings Clause, 42 U.S.C. §7515 (Supp. II, 1990), provides an alternative ground for affirming the decision of the Ninth Circuit. The effect of the Savings Clause was fully briefed by all parties below but, because the Ninth Circuit held that Section 110(c) imposes a current obligation to promulgate FIPs for the South Coast, it did not reach the Savings Clause question.

2. FIPs Need Not Interfere with the Primary Role of State and Local Authorities in Air Quality Planning

EPA argues that the Ninth Circuit decision makes the federal agency "initially and primarily responsible for developing air pollution control strategies" and has precluded EPA from "giving the state and local authorities their rightful opportunity to make the first attempt to assemble the mix of air pollution controls they believe are appropriate to achieve the huge emission reductions necessary — an opportunity they would otherwise have under the 1990 Amendments." Petition at 11. EPA, however, ignores the fact that the SCAQMD has already made the first attempt to develop an appropriate mix of air pollution controls. In fact, we have been attempting to do so for over a decade. What our attempts have shown us is that certain federal measures are needed in addition to all of the state and local measures we can muster.

EPA also ignores the fact that the Clean Air Act clearly allows FIPs to be limited in scope to what is necessary to support state efforts. The Amendments define a FIP as a plan or portion thereof promulgated by the Administrator to "fill all or a portion of a gap" or otherwise correct an inadequacy in a state implementation plan. Section 302(y), 42 U.S.C. §7602(y) (Supp. II, 1990). A FIP must include sufficient enforceable emission limitations or other control measures to, in conjunction with state and local measures, provide for attainment of the relevant national ambient air quality standard. *Id., see also*, Section 110(c) of 1977 Act, 42 U.S.C. §7410(c) (requiring promulgation of an implementation plan "or portion thereof" if state fails to submit an adequate plan).

EPA's 1990 FIP proposals demonstrate how these provisions can be used to support rather than supplant state and local efforts. As EPA stated in its 1990 FIP proposals:

> EPA strongly supports State and local initiatives . . . . Wherever legally permissible, EPA's own proposal relies, and builds upon, and reinforces these initiatives. In this way, we hope to minimize federal intrusion, avoid conflict with and duplication of local efforts, and encourage speedy implementation of the measures State and local authorities wish to adopt . . . . EPA has attempted to design its FIP so as to lend maximum support to the continued development of the State plan, and to allow it eventually to supplant the federal plan in the manner intended by the framers of the Clean Air Act. 55 Fed.Reg. 36460-61 (1990).

Consistent with its duty to fill the gaps in the state's plan, EPA proposed as part of its 1990 FIP notice to take action to approve, disapprove and defer action on provisions of the state implementation plan submitted by California for the South Coast Air Basin. 55 Fed.Reg. 36458 (1990).[1] By approving as much of the state plan as possible, EPA minimized the scope of the required FIPs.

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[1] The proposed actions were based on EPA's interpretation of the types of state measures it could approve under requirements of the 1977 version of the Clean Air Act. EPA proposed to deny full approval and emission reduction credit for portions of the SIP primarily because such provisions were not yet in the form of adopted regulations or firm commitments, or relied on technologies to be developed in the future. 55 Fed.Reg. 36469-71 (1990).

The 1990 notice then proposed FIP control requirements which were structured to preserve the primary role of state and local authorities in air quality planning. To do this, the proposed FIPs consisted of two parts: The first was a set of "core measures" which, as EPA said, "are expected to be technically feasible, cost-effective, legally enforceable, and able to be implemented expeditiously." 55 Fed.Reg. 36509 (1990). These measures consisted of reformulated gasoline requirements, standards for light-duty cars and trucks, and controls on marine vessel tanks. The FIPs then proposed two alternative approaches for achieving the more difficult emissions reductions to occur after 1995. Both approaches would serve to "backstop" the SIP. In the first approach, the "regulatory FIP," EPA would immediately put into place regulations requiring future emission reductions. These regulations would be withdrawn prior to implementation if the state and local authorities implemented measures which would achieve progress adequate to attain the ozone and CO standards by the years 2010 and 2000, respectively (the same deadlines established in the 1990 Amendments). Under the second approach, the "committal FIP," EPA would offer enforceable commitments to develop rules in the future in accordance with a set schedule. Because EPA would have additional time to develop these regulations, they could be tailored to available technology in order to minimize economic impacts. The committal FIP, like the regulatory FIP, was designed as a backstop to state and local measures and would be rescinded to the extent that the state achieved adequate progress towards attainment. 55 Fed.Reg. 36458-36576 (1990).[2] By proposing control

[2] EPA adopted a schedule of reasonable further progress (RFP) which amounts to an annual rate of reduction of 4% per year for (continued)

measures in the form of backstops, EPA's FIP proposal assured that state and local authorities would have the initial opportunity to determine the types of control requirements which would be imposed, and would retain the flexibility to update the air quality plans based on the latest data and planning.

Under the 1990 Amendments, EPA has greater latitude to defer to state and local decisionmaking than under the prior Act because the Amendments contain provisions which will enable EPA to approve a greater portion of the SIP for South Coast, thereby further diminishing the scope of the FIPs EPA is obligated to promulgate. For example, the 1990 Amendments, for the first time, authorize EPA to approve SIP provisions "which anticipate development of new control techniques or improvement of existing control technologies and an attainment demonstration based on such provisions." Section 182(e)(5), 42 U.S.C. §7511a(e)(5) (Supp. II, 1990).[3] The scope of the FIPs which EPA is

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(fn. continued)
VOC and NO_x and 4.5% per year for CO (based on year 2000 attainment date). EPA proposed to monitor the emission reductions and, if the tracking demonstrated that the required emissions reductions would be achieved without backstops, the backstops would be rescinded. These rates of reduction are similar to those proposed in the SIP prepared by the SCAQMD. 55 Fed.Reg. 36537 (1990).

[3] Additionally, EPA is now authorized to approve a plan revision based on a commitment to adopt specific enforceable measures by a date certain, not later than one year after the date of approval. §110(k)(4), 42 U.S.C. §7410(k)(4). In its notice, EPA recognized that "if the Clean Air Act is amended before final rulemaking and includes new requirements that alter the criteria for control measure approval, EPA's proposed actions, including the timetable for submitting fully enforceable measures, will be revised to be consistent with the new statutory provisions." 55 Fed.Reg. 36470 (1990).

obligated to promulgate would therefore be reduced as EPA approves, and thereby defers to, the products of state and local planning efforts.

3. FIPs Can Include Cost-Effective Control Measures which are Necessary for Attainment but which State and Local Governments Lack Authority to Implement, Thereby Spreading Regulatory Burdens and Reducing Economic Impacts

EPA argues that the only type of regulatory plan that it has the means to promulgate and implement would necessarily consist of a limited number of severe measures that would indiscriminately force huge cutbacks in emissions from most mobile, stationary, and area sources. Petition at 12. EPA argues that such extreme measures would include gas rationing, no-drive days, limits on vehicle registration, bans on high-emitting vehicles, and huge cutbacks in solvent use. *Id.* at 24. Such measures, EPA argues, would inflict far more economic and social dislocation on California than would a SIP. *Id.* at 23. These arguments are incorrect as demonstrated by EPA's own 1990 FIP proposals.

The proposed 1990 FIPs had to achieve the same goal that exists today under the 1990 Amendments — attainment of the NAAQS — but they did not contain any control measures mandating gasoline rationing, limits on vehicle registration or bans on high-emitting vehicles.[4] No-drive days were merely one alternative proposal in

[4] EPA merely requested comments on these general topics. 55 Fed.Reg. 36532 (1990).

the CO FIP.[5] With regard to cutbacks in solvent use, the Petition does not point out that the proposed *SIP* also contains extremely stringent control measures, such as a virtual 100% elimination of volatile organic compounds (the components of solvents, coatings and other chemicals which react to form ozone). Thus, part, if not all, of the "economic dislocation" resulting from the solvent measures which EPA suggests would occur under a FIP is simply a function of the enormous emission reductions necessary to attain and is not a function of which agency issues the control requirements.

In any case, under EPA's 1990 FIP proposal, no severe measures such as those described above would be implemented by EPA in the first instance. Except for the relatively easily implemented "core" measures, all measures in the 1990 FIPs are "backstops" to be implemented only if the state and local authorities fail to implement control measures achieving emission reductions necessary to attain. If such failure occurred, implementation of the federal measures would be triggered only to the extent necessary to restore adequate progress towards attainment. 55 Fed.Reg. 36462 (1990). Thus, contrary to the Petition, the FIP can, and EPA's 1990 proposal did, give state and local authorities the opportunity to implement the most cost-effective measures possible and thereby avoid implementation of federal measures.

Moreover, and perhaps most importantly, federal control measures will be required in the South Coast

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[5] The CO FIP may not be necessary *at all*, even if the previously-submitted SIP is not fully approvable, because the SCAQMD has prepared an updated CO attainment plan as required by Section 187(a)(7) of the 1990 Amendments. 42 U.S.C. §7512a(a)(7) (Supp. II, 1990) (requiring state to, by November 15, 1992, submit a plan to attain the CO NAAQS).

District if this area is to ever attain the ambient air quality standard for ozone. The SIP for the South Coast District includes every measure which state and local authorities determined could feasibly be implemented. This includes measures that would require application of known technologies as well as substantial reliance on measures which will only be implementable in the future if substantial new technologies are developed, *e.g.*, electric vehicles. Yet despite these ambitious plans, the SIP barely demonstrates attainment with the national ambient air quality standard for ozone. Appendix at A7. Many of the control measures relied upon in the proposed SIP are applicable to sources which are subject to exclusive federal jurisdiction. These sources include new construction and farm equipment with engines less than 175 horsepower,[6] aircraft,[7] and new locomotives.[8] These sources emit significant quantities of air pollutants (55 Fed.Reg. 36523, 29, 31-32 (1990)) but are relatively uncontrolled compared to sources subject to state and local authority. Without emission limitations applicable to these sources, the South Coast District cannot attain the ambient air quality standard for ozone.[9] This is known with certainty now; there is no

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[6] State and local regulation is preempted by the 1990 Amendments. §209(e)(1), 42 U.S.C. §7543(e)(1) (Supp. II, 1990).

[7] State and local regulation is preempted by §233 of the Clean Air Act, 42 U.S.C. §7573.

[8] State and local regulation of new locomotives is preempted by Section 209(e)(1) of the Clean Air Act, 42 U.S.C. §7543(e)(1) (Supp. II, 1990).

[9] Petition at 40a. EPA itself has apparently concluded that at least some of these sources must be controlled in the South Coast Air Basin. EPA has proposed to regulate some of these sources in its proposed FIP for the South Coast Air Basin. 55 Fed.Reg. 36533, 36570 (1990) (construction equipment and other off-highway mobile

(continued)

need to await another round of SIP submittals to determine whether or not these sources must be controlled.

Absent federal controls applicable to sources subject to exclusive federal jurisdiction, state and local authorities will be required to impose severe, and in all likelihood impossible, control requirements applicable to sources within state and local regulatory jurisdiction. (As discussed previously, the AQMP barely demonstrates attainment of the ozone NAAQS assuming implementation of all feasible measures, including the federal control measures.) Thus, EPA's arguments regarding the inefficiency and cost impacts of FIPs are incorrect. Without federal controls, the burden faced by sources within the South Coast District would be increased, probably to impossible levels.

In short, what is required to effectuate congressional intent that air quality standards be attained as expeditiously as practicable with, as EPA states, "concern for ensuring future economic growth and well-being," Petition at 10, is the "federal-state partnership for the control of air pollution" described by the Ninth Circuit. Petition at 15a. The regulatory authorities of local, state *and* federal governments must be brought to bear in a coordinated fashion in order to achieve the congressional goal of clean air in the South Coast Air Basin. A federal implementation plan which, as Congress mandated, "fills the gaps" in state plans, would achieve this objective.

(fn. continued)
sources); 36532 (1990) (limiting growth in emissions from locomotives, ships and aircraft). The District has commented to EPA that the proposed FIP does not propose to adequately regulate these sources.

4. EPA's Position is Contrary to Congress' Intent to Build Upon Past Efforts So As to Achieve Expeditious Attainment, Rather than Commencing the Air Quality Planning Process Anew

EPA's position is contrary to Congress' manifest intent because it would create a potential seven year hiatus in needed federal control efforts. Congress' purpose in adopting the 1990 Amendments certainly was not to make attainment of healthful air a more difficult or lengthy process. Similarly, Congress clearly did not intend to ignore well over a decade of effort under the Clean Air Act by requiring the federal control process to begin anew. Yet, as is set forth below, these are the consequences of the EPA's erroneous interpretation.

Under the 1990 Amendments, the state has until November 15, 1994 to submit a SIP revision demonstrating that attainment of the ozone standard will timely occur. §182(c)(2), 42 U.S.C. §7511a(c)(2) (Supp. II, 1990). EPA has one year to review such a submittal, and two years thereafter to promulgate a FIP, §110(c), (k), 42 U.S.C. §7410(c), (k) (Supp. II, 1990), for a total of seven years from the date of enactment. Under EPA's interpretation, this is the earliest that EPA would be required to adopt a FIP demonstrating attainment of the ozone standard. Yet, as a result of decades of state and local air quality planning pursuant to the Clean Air Act, it is known *today* that certain federal controls will be required and that a seven year delay in their adoption would jeopardize timely attainment. Appendix at

A7-A8.[10]

Contrary to EPA's position, the entire structure of the 1990 Amendments evidences an intent to build on prior efforts without any hiatus in planning or implementation actions. For example, preexisting SIPs remain in effect, §110(n)(1), 42 U.S.C. §7410(n)(1) (Supp. II, 1990), previously-required control requirements are saved, §193, 42 U.S.C. §7515 (Supp. II, 1990), preexisting guidance remains in effect, *Id.*, and existing state implementation plans must be *augmented*, not replaced, by addition of new or enhanced control measures. §110(n)(1), 42 U.S.C. §7410(n)(1), §182, 42 U.S.C. §7511a (Supp. II, 1990). The Amendments also retain the requirement that attainment of the NAAQS occur "as expeditiously as practicable." §181, 42 U.S.C. §7511(a)(1) (Supp. II, 1990).

Moreover, contrary to EPA's argument, Congress did not eliminate the fundamental element of the requirement that triggered EPA's FIP obligation. That element is the requirement that the states have an enforceable plan which contains control measures sufficient to attain the ambient air quality standards. In enacting the 1990 Amendments, Congress recognized state failures to meet this requirement but chose not to eliminate or change it; rather Congress merely specified new deadlines and certain plan elements for achieving that same goal. There is nothing in the SIP or proposed 1990 FIPs which

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[10] Emission controls applicable to many sources, including those subject to exclusive federal jurisdiction, will require significant lead times to develop and implement. In addition, many of the above-described sources have long useful lives so that, to the extent that the common practice of applying emission standards only to new units is followed, the public may not see any air quality benefits due to control of these sources until well into the 21st century. Appendix at A6-A8.

is inconsistent with either the new attainment deadlines or the state's primary role in fulfilling the planning requirements of the 1990 Amendments.[11]

5. The Section 193 Savings Clause Provides an Alternative Ground for Affirming the Decision

Because the majority below found that the language of Section 110(c) continued EPA's FIP obligations, it did not address the effect of Section 193. Petition at 8a. However, the Savings Clause provides an alternative basis for upholding the decision. The General Savings Clause of the 1990 Amendments states as follows:

> Each regulation, standard, rule, notice, order and guidance promulgated or issued by the Administrator under this Act, as in effect before the date of the enactment of the Clean Air Act Amendments of 1990 shall remain in effect according to its terms, except to the extent otherwise provided under this Act, inconsistent

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[11] State planning procedures and SIP submittal requirements specified in the Act would have to continue to be followed even if a FIP is promulgated. If the state fails to submit one of the many specifically required SIP elements (*e.g.*, clean fuel requirements, enhanced vehicle inspection and maintenance), the FIP process would be triggered for such deficiency as contemplated by Congress. To the extent that the state submits fully approvable measures, they could be substituted for portions of the FIP if they achieve equivalent emission reductions. A similar program preserving the state's primary role in air quality control was proposed by EPA as part of its 1990 FIP proposal for the South Coast Air Basin. Moreover, the attainment deadlines in the 1990 Amendments are the same as the projected dates in both the proposed SIP for the South Coast and EPA's 1990 FIP proposals. 55 Fed.Reg. 36462 (1990).

> with any provision of this Act, or revised by the Administrator. *No control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before the date of the enactment of the Clean Air Act Amendments of 1990 in any area which is a nonattainment area for any air pollutant may be modified after such enactment in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.* §193, 42 U.S.C. §7515 (Supp. II, 1990). (Emphasis added.)

By its terms, the General Savings Clause is directly applicable to the instant settlement agreement and order to promulgate FIPs for the South Coast Air Basin. The FIPs are to be made up of "control requirements" and were "required to be adopted" by an "order" and "settlement agreement" "in effect before the date of enactment of the Clean Air Act Amendments of 1990." Thus, under the General Savings Clause, the FIPs may not be modified after enactment of the 1990 Amendments "in any manner" unless the modification ensures equivalent or greater emission reductions. Here, EPA is not seeking to ensure equivalent or greater emission reductions; rather, it seeks a total and unconditional elimination of the requirement to promulgate FIPs. Congress has expressly prohibited this under Section 193.

EPA attempted to avoid the literal meaning of the General Savings Clause by arguing that the term "control requirement" refers only to a discrete regulation directed at a specific source of pollution, or an order to promulgate a FIP containing a few specific control requirements. EPA argued that since the settlement agreement and order in the instant case required development of plans including many control measures which had not

yet been specifically defined, the General Savings Clause is inapplicable.

The distinction which EPA invents between an order mandating adoption of a control requirement which is specifically defined at the time of the order, and one which is not yet specifically defined at the time of the order, finds no basis in the statute and is contrary to congressional intent evidenced by the broad wording of the savings clause. The FIPs required by the settlement agreement and order in this case must, by definition, be made up of "control measures,"[12] a phrase certainly encompassed within the broad term "control requirements." The expansive language in the General Savings Clause (*e.g.*, specifying that control requirements are preserved whether "required to be adopted by an order, settlement agreement, or plan") also evidences congressional intent to ensure the broad applicability of the General Savings Clause.

Moreover, the distinction between defined and undefined measures which EPA makes is illogical from a policy perspective. The fact that the proposed South Coast Air Basin FIP must contain numerous control measures which were not specifically defined at the time of the settlement agreement and order is a function of the massive air quality problem this area faces, the great number and breadth of control requirements necessary to address the problem, and the failure of EPA to carry out its obligation to timely disapprove the SIP and develop

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[12] The Clean Air Act defines a FIP as:

> a plan . . . which includes enforceable *emission limitations* or other *control measures*, means or techniques . . ., and *provides for attainment* of the relevant national ambient air quality standard. (Emphasis added.) §302(y) at 42 U.S.C. §7602(y) (Supp. II, 1990).

FIPs. It would be anomalous to interpret the General Savings Clause as imposing a lesser control obligation for highly polluted areas such as the South Coast Air Basin than for areas in which far lesser controls are required. Moreover, under EPA's backwards formulation, the agency would be relieved of the FIP obligation primarily because it failed to carry out its duty to disapprove the SIP and develop specific FIP measures in a timely fashion. *See Abramowitz v. EPA*, 832 F.2d 1071 (9th Cir. 1987).

Finally, the legislative history of the General Savings Clause demonstrates congressional intent to preserve EPA's obligation to promulgate FIPs. In the Congressional Record for October 27, 1990, Senator Baucus, Chairman of the Conference Committee for the 1990 Amendments, explained the purpose of the General Savings Clause. As floor manager of the 1990 Amendments and Chairman of the Conference Committee, Senator Baucus' remarks are entitled to substantial weight, *Mills v. United States*, 713 F.2d 1249 (7th Cir. 1983). Senator Baucus stated that under the 1990 Amendments EPA need not promulgate complete FIPs for the South Coast "based on requirements of the old Act." However, according to Senator Baucus, EPA is obligated to "*complete ongoing FIP processes*" *for the purposes of "ensuring that the standards are met by the statutory deadlines.*" In discussing the South Coast FIPs, Senator Baucus stated that "*EPA has the obligation to adopt control measures for sources which it exclusively controls when those controls are necessary to help attain national standards or meet other requirements of*

the Act . . . ."[13] Senator Chafee made a similar statement in a colloquy with Senator Wilson.

The interpretation found in the statement of Senator Baucus that EPA need not adopt FIPs based on the old Act, but must complete ongoing FIP processes to assure attainment, is directly supported by language of the 1990

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[13] The full statement reads as follows:

> "The savings clause in the new legislation is intended to ensure that no backsliding occurs from implementation of adopted, currently feasible measures that EPA has approved as part of a SIP in the past, or currently feasible measures that EPA has added to state plans on its own initiative or pursuant to a court order or settlement, including a Federal Implementation Plan. We do not intend that this savings clause requires EPA to finalize the Federal Implementation Plan in California and preempt the state's and regional air quality planning that is ongoing in Los Angeles area and will otherwise be required under this legislation. If EPA were to promulgate complete new plans *based on requirements of the old Act*, the area subject to those federal plans would be deprived of the opportunity to use the significantly revised and clearly more workable requirements of the new legislation. We agree that this would be unreasonable, particularly since the proposed FIP fails to recognize the critical role that local governments play in reducing transportation-related emissions.
>
> "The savings clause provides EPA with significant discretion with respect to FIPs in California. *EPA has the obligation to adopt control measures for sources which it exclusively controls when those controls are necessary to help attain national standards or meet other requirements of the Act but, beyond that, EPA should complete ongoing FIP processes only for the purposes of ensuring that the standards are met by the statutory deadlines.*" 136 Cong.Rec. S.16970 (Daily Ed. Oct. 27, 1990). (Emphasis added.)

Amendments which provide EPA flexibility to approve greater portions of the SIP, *e.g.*, §182(e)(5), 42 U.S.C. §7511(e)(5) (Supp. II, 1990), and which define a FIP as a device to fill the remaining gaps in the state's attainment demonstration. §302(y), 42 U.S.C. §7602(y) (Supp. II, 1990). The authoritative statements by the Chair of the Conference Committee are *totally incompatible* with EPA's position that it has absolutely no obligation to promulgate any type of FIP in the South Coast Air Basin. If any type of FIP obligation survives, as it does, EPA's position must be rejected.

CONCLUSION

For the foregoing reasons, EPA's Petition for Writ of Certiorari should be denied.

DATED: December 17, 1992.

Respectfully submitted,

PETER M. GREENWALD
Counsel of Record
for Respondent

SOUTH COAST AIR QUALITY
MANAGEMENT DISTRICT

APPENDIX

The Declaration of Barry Wallerstein as included in the Excerpts of Record at 64-76, *Coalition for Clean Air, et al. v. EPA*, 971 F.2d 219 (9th Cir. 1991) (Nos. 91-55383, 91-55386, 91-55634) reads as follows:

DECLARATION OF BARRY R. WALLERSTEIN

I, Barry R. Wallerstein, affirm and declare that the following statements are true and correct to the best of my knowledge and belief and are based on my personal knowledge or on information contained in the records of the South Coast Air Quality Management District ("SCAQMD") or supplied to me by employees at the SCAQMD.

1. My name is Barry R. Wallerstein, and I am employed by the South Coast Air Quality Management District (SCAQMD) as the Director of Planning.

2. My educational background consists of a Doctorate in Environmental Science and Engineering from the University of California at Los Angeles (1988) and a Bachelor's (1977) and Master's (1980) degree in Biological Science from the University of Southern California.

3. As Director of Planning for the South Coast Air Quality Management District I am responsible for development of the Air Quality Management Plan (AQMP or Plan) to attain federal and state air quality standards and all District analyses related to attainment of federal ambient air quality standards in the South Coast Air Basin. This includes: pollutant emission control strategy development, air quality modeling, economic impact analysis, environmental impact evaluation, energy conservation and demand analysis, and public health assessments. There are currently 75 staff positions within the South Coast Air Quality Management District Planning Division.

4. From August 1988 until January 1989, I was an Environmental Control Administrator for Northrop Corporation. My duties included administration of company-wide efforts to comply with hazardous waste regulations and development of initiatives to promote waste minimization.

5. From July 1984 until August 1988, I was a member of the South Coast Air Quality Management District staff, most recently in the Rule Development Division as the Program Supervisor for coating and solvent rules to implement the AQMP. Prior to that position I served as the Program Supervisor in the Planning Division for development of short and long-term control measures for the 1989 Air Quality Management Plan Revision.

6. From 1982 to July 1984, I was a member of the rule development staff in the Mobile Source Division of the California Air Resources Board (ARB). My activities included development of ARB's portion of the 1982 State Implementation Plan, diesel particulate standards for passenger cars, tailpipe standards for motorcycles, and emission test procedures for heavy-duty vehicles.

7. Prior to 1982, I was employed as a research assistant on a variety of projects related to new energy technologies and the effects of coastal power plants on the marine ecosystem. Several of these projects included evaluation of technologies currently proposed to reduce air pollutant emissions in California.

8. The purpose of the Air Quality Management Plan is to set forth a comprehensive program for the South Coast Air Basin to achieve all federal and state ambient air quality standards. The Plan is intended to serve as the South Coast Air Basin portion of the State Implementation Plan required by the Federal Clean Air Act. In addition, the Plan is designed to comply with all other requirements of the federal and California Clean Air Acts.

9. The South Coast Air Basin, which comprises all of Orange County and the non-desert portions of Los Angeles, Riverside and San Bernardino Counties, has the worst air quality in the nation. Despite having put into place many strict controls, the Basin still fails to meet the federal air quality standards for four of the six criteria pollutants.

10. In 1989, one or more of the federal standards were exceeded on 219 days in the Basin. The federal ozone standard was exceeded on 120 days, over three times as frequently in the Basin as in any other area of the United States. The Basin was the only area in the country to exceed the federal nitrogen dioxide standard. It exceeded the carbon monoxide standard most frequently as well, with two and one-half times as many exceedances as the next worst area of the nation.

11. Attachment 1 shows the maximum pollutant concentrations in 1989 as a percentage of the state and federal standards. Attachment 2 shows the percentage of days, months, or quarters which each pollutant exceeded the standards at the most affected location.

12. The AQMP includes all the potential control measures that could possibly be available by the year 2010 given current technology and possible technological breakthroughs. The identified control measures are categorized into three tiers, based upon their readiness for implementation. Full implementation of all three tiers will reduce ozone precursor emissions by more than 80 percent and carbon monoxide emissions by approximately 60 percent. Such emission reductions are needed to attain federal standards. The difficulty of achieving these reductions is clear when one realizes that significant sources are currently controlled by over 80-90%. The AQMP thus proposes even more stringent controls and controls applicable to every conceivable source, from utility boilers to barbecues.

13. Tier I control measures are defined as those that can be adopted in the next five years with currently available technological applications and management practices. Implementation (and construction) of these measures will occur over the next twenty years. Several of these measures are directed at the control of pollution sources which are solely under federal jurisdiction.

14. Over 120 Tier I control measures are currently identified in the AQMP. They reduce emissions by:

- reduction in the use of pollutant-emitting materials;
- use of the most efficient pollution control devices;
- programs to control fugitive emissions from industrial processes;
- maximizing the efficiency of the transportation infrastructure to provide less polluting forms of transportation;
- maximizing the effectiveness of existing measures through improved administrative practices;
- seeking public and private commitments for the required implementation actions.

15. Tier II requires further advancement or improvement of existing Ozone and PM10 control technologies. Tier II is expected to be implemented in the next ten to fifteen years. In some cases, new technological applications not presently on the market are required, but these could be expected to develop through continuous improvements and refinements to products currently available. Regulatory intervention is employed whenever necessary to expedite commercialization of new products and to mitigate future emission growth. Tier II also includes measures which require additional funding and/or legislative authority. Sources solely under

federal jurisdiction are also targeted as part of the Tier II control strategies.

16. The Tier II measures would reduce emissions by:

- extending current technological applications beyond the levels historically pursued;
- regulatory intervention through technology-forcing standards or emission charges, *e.g.*, by requiring a 50% reduction in solvent emissions from coatings (which already must meet stringent limits);
- developing public and private commitments for the required implementation actions, including additional funding and/or legislative authority as necessary.

17. The Tier III programs are designed to bring about technological breakthroughs to further reduce reactive organic gas emissions to achieve the federal ozone standard. These programs are directed at the sectors where significant emissions still exist after implementation of Tiers I and II.

18. The Tier III programs include:

- Solvents and Coatings in industrial, commercial, and residential applications.
- Remaining petroleum based-fuel emissions in stationary and mobile applications.
- Unlike Tier II, which focuses on further strengthening known emission controls, Tier III calls for efforts to develop new technology to reduce remaining emissions.

19. All three tiers of controls are needed to achieve attainment of the federal ambient air quality standards, including ozone and carbon monoxide. Recently completed analysis indicates, with full implementation of all three tiers, the Basin will achieve the federal carbon

monoxide standard in the year 2000 and the federal ozone standard in the year 2010. These attainment projections include control of emissions sources under federal jurisdiction and without such controls attainment will not be possible.

20. The proposed 1991 AQMP contains several control measures aimed at controlling emissions from sources subject to exclusive federal jurisdiction including aircraft, locomotives, and construction equipment and farm equipment. In addition, the AQMP proposes measures for implementation by the federal government which, because of practical or legal constraints, require federal regulations to fully or effectively control their emissions. Such sources include outer continental shelf operations and marine vessels.

21. The above-described sources subject to federal regulation contribute three percent of total ROG emissions and 11 percent of NO_x emissions in the Basin. The emissions reduction potential associated with these measures is estimated to be 23 tons per day of ROG, 60 tons per day of NO_x, and 32 tons per day of CO in 2010. AQMP control measures for these federally-regulated facilities are listed in Attachment 3. These are extremely significant emission levels, particularly in an area such as the District which must stringently regulate sources as small as personal deodorants in order to attain.

22. In addition, while not currently addressed by an AQMP measure, motor vehicles originating out-of-state must also be characterized as sources under exclusive federal jurisdiction. Currently, these vehicles constitute approximately 20 percent of the in-use vehicle fleet in the South Coast Air Quality Management District, which corresponds to 1.2 million vehicles. Since emission standards for out-of-state vehicles are substantially less stringent than California vehicles, the potential

emissions penalty associated with their operation can be significant. The 1990 Amendments to the Clean Air Act provide that EPA must determine whether or not to impose "Phase II" emission standards applicable to such "49 state" vehicles sold in 2003 and later. If EPA decides to impose these standards, emission reductions in the South Coast Air Basin are estimated to be as high as six tons per day of hydrocarbons, 11 tons per day of NO_x, and 60 tons per day of CO. Such reductions would substantially aid the District's attainment effort and reduce the control burden applicable to sources subject to state and local jurisdiction.

23. Moreover, every conceivable emission reduction that is feasible is included in the AQMP and the AQMP barely attains the federal ozone ambient air quality standard. Even if unforeseen or targeted technological breakthroughs were to occur (beyond the ambitious assumptions in the AQMP), available control measures on federal sources would still be needed to achieve reasonable further progress in the early to intermediate years of Plan implementation, and to attain as expeditiously as practicable or required by the Clean Air Act.

24. If the decision to adopt control measures applicable to these federally-regulated sources is delayed from the adoption schedules set forth in Attachment 3, timely attainment of the ozone ambient air quality standard will be jeopardized. Controls applicable to many of these sources (*e.g.*, aircraft), can take years to develop and many more years to implement. Control requirements for mobile sources generally are only applied to new units. This, and the long useful lives of aircraft, construction equipment, locomotives, *etc.*, would mean that significant emission reductions would not be realized until many years after the effective date of the emission limits. In my opinion, attainment of the federal ozone

ambient air quality standard will be made substantially more difficult if development efforts for control requirements applicable to the above-described sources do not commence soon and adoption of regulations is delayed beyond the dates set forth in Attachment 3.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 21st day of December, 1990, at El Monte, California.

/s/ Barry R. Wallerstein
Barry R. Wallerstein

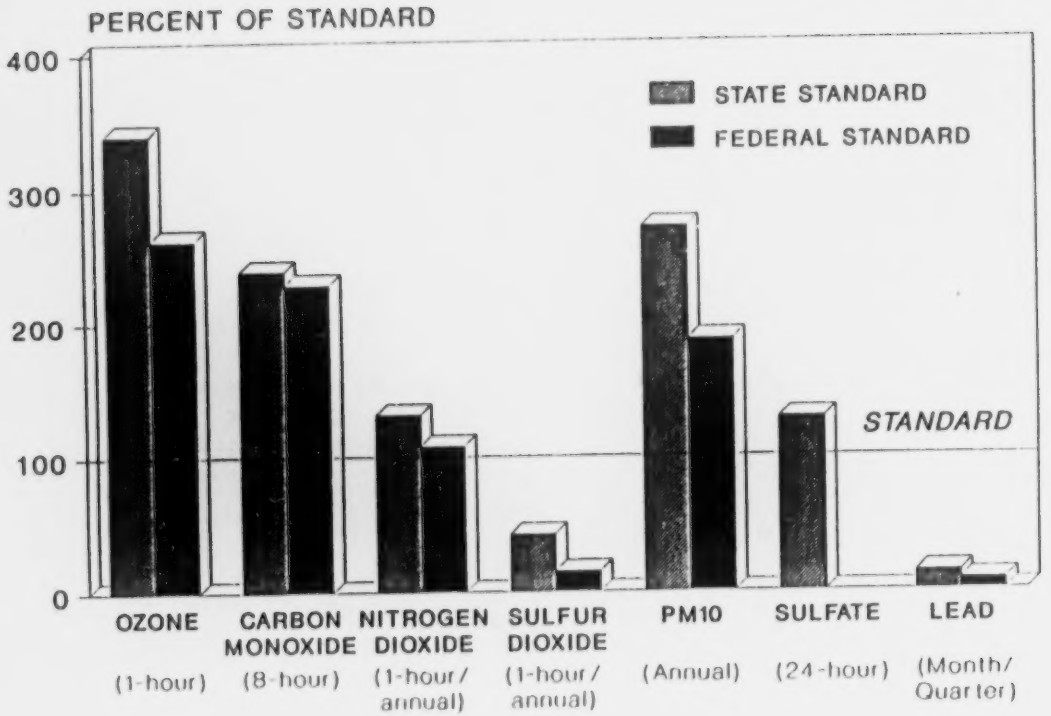
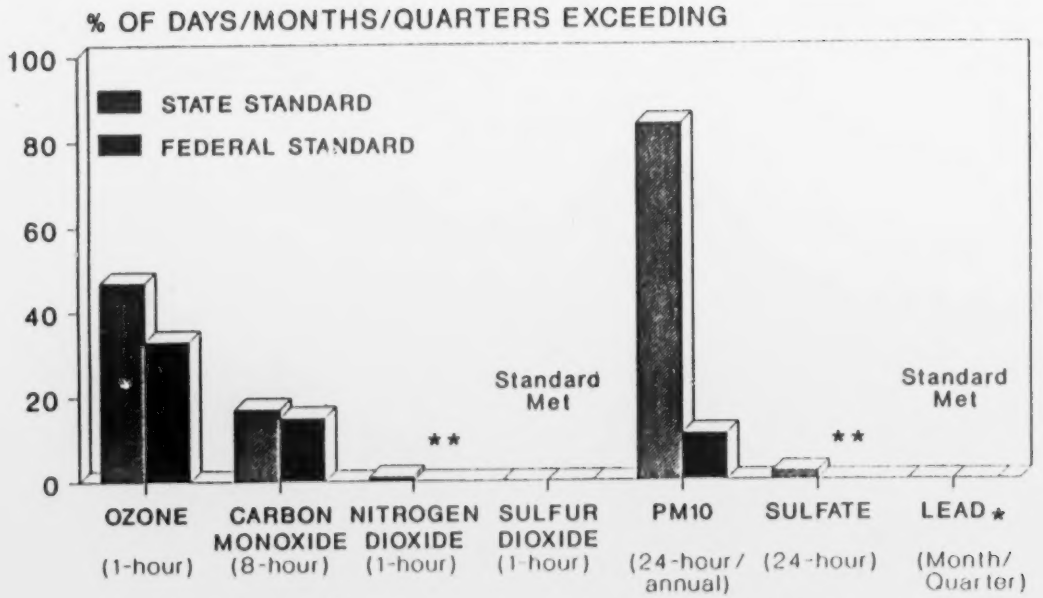


FIGURE 2-2

1989 Maximum Pollutant Concentrations
as Percent of State and Federal Standards



*Percent of months for state standard and percent of quarters for federal standard.
**There is no federal standard for sulfate and no short term federal standard for nitrogen dioxide.

FIGURE 2-3

1989 Percent of Days/Months/Quarters Exceeding
State and Federal Standards at Most Affected Locations

Federal Government - Tier I Control Measures

AQMP No.	Measure Title	Proposed Implementation Date	Proposed Emission Reductions (Tons/day) ROG	NO^x	CO	Proposed Adoption Date
M-I-2	Control of Emissions from Jet Aircraft [ROG, CO, NOx]	1996-2000	3.4	8.1	13.4	1992
M-I-3	Control of Emissions from Marine Vessel Tanks [ROG]	1994-1997	4.8	0	0	1991
M-I-6	Low Emissions from Military Aircraft [ROG, CO, NOx]	2000-2005	3.2	1.5	6.6	1995
M-I-8	Emission Standards for Construction and Farm Equipment [ROG, NOx, CO, PM10] (175 HP and less)	*	2.0	15.6	0	1994
9	Replacement of High Emitting Aircraft [All Pollutants]	2000	3.1	3.3	6.5	1992
14	Railroad Electrification [All Pollutants]	2005	1.1	23.7	3.6	1998
P-B-5	Control of Emissions from OCS Exploration, Development and Production [All Pollutants]		DOI/EPA/		1992	1996

* To be determined at a later date.

Supreme Court, U.S.
FILED
JAN 15 1993
OFFICE OF THE CLERK

No. 92-798

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

COALITION FOR CLEAN AIR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

As demonstrated in the petition (Pet. 13-22), the court of appeals effectively nullified Congress's decision, expressed in the 1990 Amendments to the Clean Air Act, to give California the initial responsibility for developing the governmental response to the severe problems of air pollution in the Los Angeles area. Respondents fail to provide any convincing rationale to justify that judicial overruling of Congress's specifically focused determination. See Point 2, *infra*. Instead, implicitly recognizing the weakness of the court of appeals' ruling on the merits, respondents principally attempt to minimize the practical consequences of the decision below. In fact, however (see Point 1, *infra*), there is no assurance that respondents' optimistic and ultimately speculative predictions will prove correct—even if those predictions would otherwise justify the court of appeals' remarkable departure from the statutory scheme.

1. Respondents seek to minimize the impact of an immediate EPA federal implementation plan (FIP) for

ozone by downplaying the burdens that it could impose and by overstating the current availability of approvable state control measures to relieve EPA of its FIP burden. See Coalition for Clean Air, et al. (CCA) Br. in Opp. 9-17; South Coast Air Quality Management District (SCAQMD) Br. in Opp. 9-17. In fact, however, respondents' legal position in this case would either force EPA to produce an ozone FIP for the South Coast in the absence of the very state measures that respondents assert the FIP can complement, or compel the relevant state authorities to accelerate their planning efforts beyond the pace dictated by the 1990 Amendments. That is so because Section 110(c) requires the preparation of a FIP unless "the State corrects the deficiency and the Administrator approves the plan or plan revision" before issuing a FIP. 42 U.S.C. 7410(c)(1) (Supp. II 1990). In order for EPA's Administrator to approve a state plan, it must be "submitted" by the State for approval, *ibid.*, and it must include "enforceable emission limitations and other control measures." 42 U.S.C. 7410(a)(2)(A) (Supp. II 1990).

a. As a result of these provisions, if EPA has an obligation to prepare a FIP now for ozone attainment, it cannot rely on current state and local planning efforts to relieve it of that obligation unless and until California submits an ozone SIP revision to EPA and the agency approves it prior to the promulgation of the final FIP. Under the 1990 Amendments, the time for submission of the SIP revisions for ozone attainment in the Los Angeles area is November 15, 1994. 42 U.S.C. 7511a(c)(2) and (e) (Supp. II 1990). Accordingly, California would be denied much of the planning time afforded by the 1990 Amendments if it were to submit a revised SIP in time to fill any portion of the "gap" ordered to be filled by EPA in this case.[1]

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[1] California recently submitted its revised carbon-monoxide SIP under the 1990 Amendments. EPA has just begun its review of that

In California, the state agency that adopts and submits SIP revisions to EPA for approval is the California Air Resources Board (CARB). In 1991, respondent SCAQMD adopted a plan revision addressing ozone, but that 1991 plan has not yet been adopted by CARB for submission as a SIP revision. Indeed, the CARB staff has determined that the 1991 plan would be inadequate as a SIP because "[m]ost of the plan elements * * * are incomplete" and are "unlikely to be approved by EPA." CARB staff report, Sept. 16, 1992, at 34.[2] Moreover, the 1991 plan is the subject of a state court challenge filed by one of the respondents in this case. *Coalition for Clean Air* v. *California Air Resources Board*, No. 372697 (Cal. Super. Ct., Sacramento County, filed Nov. 19, 1992). Accordingly, it is at best speculative that an approvable SIP submittal will be forthcoming to foreclose the adoption of a fully independent FIP.[3]

In its 1990 proposed FIP for the South Coast, EPA considered a 1989 SIP submission based, in part, on a 1989 plan prepared by SCAQMD.[4] That 1989 SCAQMD plan

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plan, however, so it is unclear whether it satisfies the requirements of the Act.

[2] EPA staff informs us that CARB staff has suggested, in informal discussions, that, as a last resort, it would be inclined to recommend that CARB submit portions of the concededly inadequate 1991 plan as a SIP if EPA ultimately must promulgate a FIP. In light of CARB staff's own assessment of the current plan, the prospect that such a submission would obviate the need for a FIP is remote.

[3] The Clean Air Act, moreover, affords EPA 60 days after a plan submission to determine whether such a submission meets minimum criteria and a further 12 months after that deadline to determine whether such a submission should be approved. 42 U.S.C. 7410(k)(1) and (2). In order to forestall the obligation to adopt a FIP, the SIP revision must not only be submitted, but must be approved by the Administrator. 42 U.S.C. 7410(c) (Supp. II 1990).

[4] The 1989 SIP submission was also based in part on the revised version of the California motor vehicle program adopted by CARB. See 55 Fed. Reg. 36,472 (1990). EPA was willing to credit the South Coast for emission reductions projected by this program under the expectation that the revised program itself would be submitted as a SIP revision.

contained relatively few immediately enforceable emissions limitations and consisted largely of a schedule upon which additional emissions limitations on various categories of sources would be adopted by state and local agencies in the future. See 55 Fed. Reg. at 36,479-36,484. EPA proposed to approve limited portions of the SIP submission but proposed to reject the central showing of reasonable further progress and the attainment-demonstration portion of the 1989 SIP "because the measures in the revised SIP do not provide sufficient emissions reductions in an enforceable form." *Id.* at 36,466. Respondents' reliance on the 1989 SIP (CCA Br. in Opp. 12; SCAQMD Br. in Opp. 11) is therefore misplaced, because the 1989 SIP was inadequate when it was submitted and it appears that the 1989 SCAQMD plan has been superseded by the 1991 SCAQMD plan.

In short, California's plans to address attainment of the Act's ozone standards in the South Coast are currently in an uncertain state. Respondents' assurance that EPA's FIP "can be limited in scope to what is necessary to support state efforts" (SCAQMD Br. in Opp. 10; CCA Br. in Opp. 17), thus ignores the central fact that those "state efforts" have not matured into a SIP submittal that EPA could approve as a mechanism for lessening the "gap" to be filled by a FIP.

b. Respondents next argue (CCA Br. in Opp. 14-16; SCAQMD Br. in Opp. 7, 14-15) that an EPA FIP would not necessarily include harsh measures, and point to EPA's 1990 FIP proposal as evidence for that proposition. In fact, however, the "backstop" regulatory measures proposed as an alternative in the 1990 proposed FIP were viewed as draconian by commentators. The 1990 proposal anticipated that near-term reductions in ozone precursors could be achieved through a combination of state-proposed

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Ibid. Most of that program has never been formally submitted by the State for approval as part of the SIP.

measures and federal reformulated-fuels and other measures (55 Fed. Reg. at 36,462), but called for across-the-board reductions in emissions from all stationary and other sources in the area as one alternative means of attaining the necessary emissions reductions in later years. *Id.* at 36,462-36,463. Those proposed reductions were deemed "technologically infeasible" and "inequitable" by SCAQMD in 1990. Letter from Norton Younglove, Chairman, SCAQMD Board to EPA Regional Administrator Daniel McGovern at 1-2 (Oct. 5, 1990). Similarly, CARB predicted that "adverse effects would happen even if the measures are adopted but never implemented," because businesses would realize that they would not be able to comply and would "leave the basin in advance of implementation." Letter from James D. Boyd, Executive Officer, California Air Resources Board to EPA Regional Administrator Daniel McGovern at 6-7.

Respondent CCA argues (Br. in Opp. 16) that stringent regulatory FIP measures are a speculative threat, and that whether to impose them is a matter of EPA choice. EPA struggled in its 1990 proposal to avoid such measures, and would no doubt continue such efforts to mitigate the harsh impacts of a FIP if it were required to issue one here. The inescapable reality, however, is that the emissions reductions required to close the "gap" in the current plans amount to more than 80% of the ozone precursors in the air basin. 55 Fed. Reg. at 36,460. The techniques or measures that are both available to EPA and capable of independent federal enforcement to meet these demands are strictly limited. As a result, EPA will, in all probability, be required to propose extraordinarily stringent measures if it is to prepare a comprehensive ozone FIP independent of further state plans approvable as a SIP.[5]

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[5] Respondent SCAQMD argues (SCAQMD Br. in Opp. 13) that EPA can avail itself of the authority under new Section 182(e)(5), 42 U.S.C. 7511a(e)(5) (Supp. II 1990), to lessen the burden of a FIP. That Section

Respondent CCA contends (Br. in Opp. 14-16) that there are financial costs associated with *any* plan to improve air quality, state or federal, and that the social and economic burdens of a FIP will be no greater than those ultimately required under a SIP. In fact, however, the limited techniques available to the federal government, in comparison to those available to the state and local governments, dictate that emission reductions mandated by a fully independent FIP would be likely to impose greater burdens on the economic and social life of the community. Pet. 22-23; Los Angeles Chamber of Commerce Amicus Br. Curiae 5-7. Moreover, respondent's argument fails to account for the incremental costs that would result from duplication of compliance efforts by affected sources if the State fails to submit a SIP revision that can be approved by EPA prior to promulgation of a FIP. As sources attempt to make the long-term capital investments necessary to meet their compliance obligations, they will be faced with questions concerning *which* plan—state or federal—will ultimately be controlling. To the extent that affected sources are subject to different control requirements by different governmental entities, pollution control requirements necessarily become even more onerous.

2. a. As we explain in the petition (Pet. 16-17), the court of appeals' interpretation of the Clean Air Act is illogical. FIPs are defined as federal plans designed to remedy gaps

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authorizes EPA to approve certain South Coast ozone SIP submissions that anticipate development of new or improved control technologies. SCAQMD's reliance on Section 182(e)(5) ignores the fact that the State has not yet submitted any South Coast ozone plan to EPA for approval under the 1990 Amendments.

Respondents also suggest (SCAQMD Br. in Opp. 12) that EPA could issue a FIP composed of EPA commitments to develop and adopt at a later date measures to achieve emissions reductions. EPA proposed such a "committal" FIP as an alternative in its 1990 FIP proposal, but noted that "it is unclear whether a committal FIP for the [South Coast] would be consistent with the statute." 55 Fed. Reg. at 36,503. The 1990 Amendments did not eliminate that uncertainty.

or "inadequac[ies]" in SIPs. 42 U.S.C. 7602(y) (Supp. II 1990). The "inadequacy" that gave rise to the FIP obligation in this case was the State's failure to meet pre-1990 deadlines that were repealed by the 1990 Amendments. Thus, the court of appeals in effect read the Act to require issuance of a FIP to remedy an "inadequacy" that no longer exists.

Respondent CCA claims that the "lack of sufficient measures [in the pre-1990 South Coast SIP] to attain NAAQS by *any* date, including the new statutory deadlines, is the 'gap' that EPA must now fill." CCA Br. in Opp. 11 n.11. But it is illogical to say that the old SIP was declared deficient in 1988 because it did not demonstrate compliance with deadlines that were not imposed until 1990.[6] The "gap" that occasioned EPA's 1988 disapproval plainly related to the old law, not the new.

Respondent SCAQMD suggests (Br. in Opp. 16-17) that its inability under the Act to address certain mobile sources of pollution—new construction and farm equipment, aircraft, and new locomotives—creates a gap as to those sources, and recommends that EPA fill that gap in a FIP. That argument disregards the new statutory scheme. The 1990 Amendments established specific schedules and conditions under which EPA is to regulate most of those classes of mobile sources pursuant to Title II of the Act.[7] Those provisions are wholly separate from,

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[6] Even the court of appeals did not endorse this reading of the Act. To the contrary, the court expressly declined to "decide whether EPA would be required to meet any additional requirements imposed by the 1990 Amendments in promulgating FIPs for the South Coast." Pet. App. 13a.

[7] Section 209(e)(1) preempts the States from regulating new locomotives, new locomotive engines, and new farm and construction equipment with engines of less than 175 horsepower. 42 U.S.C. 7543(e)(1) (Supp. II 1990). Section 213 in turn requires EPA to issue national standards for new locomotives and locomotive engines by 1995, and requires EPA to issue standards for other nonroad engines by

and independent of, the Title I SIP and FIP provisions at issue in this case. Thus, the statutory scheme provides no support for SCAQMD's suggestion that EPA must address those sources immediately by promulgating a FIP.

b. Respondents contend (CCA Br. in Opp. 28; SCAQMD Br. in Opp. 20-22) that the second sentence of the 1990 Amendments' savings clause, which precludes modification of any "control requirement * * * required to be adopted by an order [or] settlement agreement," preserves EPA's FIP obligation in this case. 42 U.S.C. 7515 (Supp. II 1990). For the reasons set forth in the petition (Pet. 17-18), that contention is without merit, because the obligation to promulgate a FIP is not itself a "control requirement" subject to the savings clause. See also Pet. App. 39a-40a. Even if there were some doubt about the meaning of the term "control requirement," EPA's reasonable interpretation of that term as encompassing only specific emissions-control measures would be entitled to deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984).

Moreover, the savings clause preserves preexisting orders that require the adoption of control measures only "to the extent" that they are not "inconsistent with any provision of this [Act]." 42 U.S.C. 7515 (Supp. II 1990). The 1990 Amendments repealed the deadlines on which EPA's 1988 disapproval of the South Coast SIP submittal had been based, and substituted new ozone-SIP requirements that the State has not yet attempted to meet by submitting a revised ozone SIP. Thus, EPA's 1988

November 1992 if certain findings are made. 42 U.S.C. 7547(a)(3) and (5) (Supp. II 1990).

Title II also establishes EPA's authority, in conjunction with the Department of Transportation, to regulate emissions from aircraft. 42 U.S.C. 7571-7574. The States are preempted from imposing more stringent standards "respecting emissions of any air pollutant from any aircraft or engine," 42 U.S.C. 7573, but the Act does not prevent the States from reducing aircraft emissions in other ways.

disapproval of the South Coast SIP is "inconsistent with" the new SIP provisions of the 1990 Amendments, and does not survive by reason of the savings clause.

c. Respondents err in contending (CCA Br. in Opp. 6-7, 22-23; SCAQMD Br. in Opp. 8, 23-24) that the legislative history of the 1990 Amendments supports their interpretation of the Act. Respondents rely on Senator Baucus's statement that "EPA should complete ongoing FIP processes only for the purposes of ensuring that the standards are met by the statutory deadlines." CCA Br. in Opp. 7 (quoting 136 Cong. Rec. S16,970 (daily ed. Oct. 27, 1990)); SCAQMD Br. in Opp. 23. Respondents read this statement to mean that EPA must promulgate a FIP now, but fail to explain how that interpretation can be reconciled with Senator Baucus's contemporaneous statement that "[w]e do not intend that this savings clause requires EPA to finalize the Federal Implementation Plan in California." 136 Cong. Rec. S16,970 (daily ed. Oct. 27, 1990); see Pet. 21. Read together, the Senator's two statements show that he believed that the 1990 Amendments suspended EPA's pre-1990 FIP obligation, but that EPA will need to promulgate a FIP demonstrating attainment if California ultimately fails to meet its SIP obligations under the 1990 Amendments.[8]

d. Finally, respondent CCA's contention that *Chevron* does not apply here (CCA Br. in Opp. 26-27) is incorrect. CCA errs in suggesting that *Chevron* deference has never been applied in a mandatory duty context. See *Japan Whaling Ass'n* v. *American Cetacean Soc'y.*, 478 U.S. 221,

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[8] Respondents also rely in part on floor statements to the effect that "EPA has the obligation to adopt control measures for sources which it exclusively controls when those controls are necessary to help attain national standards or meet other requirements of the Act." 136 Cong. Rec. S16,970 (daily ed. Oct. 27, 1990). Those statements, however, refer to the mobile sources of pollution (*i.e.*, non-road engines, locomotives, and aircraft) that EPA alone can address under its authority in Title II of the Act, and shed no light whatsoever on the question whether EPA must promulgate a FIP under Title I of the Act.

231-235 (1986) (Court deferred to agency's reasonable determination of circumstances under which mandatory statutory duty arose). Nor is it necessary for Congress to provide an express delegation to the agency, as respondents imply (CCA Br. in Opp. 27). See *Pauley* v. *Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991) (Congress may delegate interpretive authority to an agency either "through express delegation or the introduction of an interpretive gap in the statutory structure").[9]

The relevant provisions of the amended Act either clearly dispense with the old-law FIP obligation, or can reasonably be interpreted in that way. As a result, under either prong of the analysis mandated in *Chevron*, the court of appeals' decision to the contrary is erroneous.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Solicitor General

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JANUARY 1992

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[9] Respondents also rely (CCA Br. in Opp. 4-5, 22-23) on the letter written by EPA Administrator Reilly to Congress some six months before enactment of the 1990 Amendments, but EPA's post-enactment interpretation of the Act should be regarded as the agency's authoritative interpretation. See Pet. 20-21. EPA cited that interpretation in a supplemental brief filed on April 3, 1992. Thus, at the time of its decision on the merits, the Ninth Circuit had before it EPA's contemporaneous construction of the statute.

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No. 92-798

IN THE

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OCTOBER TERM, 1992

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Petitioners

v.

COALITION FOR CLEAN AIR, *et al.*

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

THE LOS ANGELES AREA CHAMBER OF COMMERCE'S MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S PETITION FOR A WRIT OF CERTIORARI

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THE LOS ANGELES AREA CHAMBER OF COMMERCE'S MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Los Angeles Area Chamber of Commerce hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of the United States Environmental Protection Agency's petition for a writ of certiorari. The Chamber of Commerce obtained the consent of petitioner United States Environmental Protection Agency (EPA) and of the following parties below: Southern California Association of Governments (SCAG), Southern California Edison Company, Southern California Gas Company, and the South Coast Air Quality Management District (SCAQMD). The Chamber has filed with the Clerk of the Court telefaxed letters from these parties, addressed to the Chamber's attorneys, indicating such consent. The consent of the attorney for respondent Coalition for Clean Air and Sierra Club, Inc. was requested but refused. Representatives of the Environmental Council of Sacramento and Sierra Club, Inc., who par-

ticipated as *amici curiae* in the court of appeals proceeding, could not be reached.

The interest of the Los Angeles Area Chamber of Commerce in this case arises from its members' intimate connection with the Los Angeles area economy and the effect of federal and state environmental regulation upon it. The Chamber is in a unique position to express the Southern California business community's serious concern about the severe and widespread effect of the Ninth Circuit's ruling, and of a federal implementation plan, on persons other than the immediate parties, specifically, the people and businesses of Los Angeles. As the representative of many of the businesses that must ultimately comply with whatever regulations are promulgated, the Chamber is able to place the case in its broadest and most significant factual context. Specifically, the Chamber offers its *amicus curiae* brief to assist this Court in determining whether, among other reasons, the severe practical consequences of the decision below to Southern California's social and economic well-being warrant granting the petition.

Dated: December 7, 1992

Respectfully submitted,

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THE LOS ANGELES AREA CHAMBER OF COMMERCE'S BRIEF *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S PETITION FOR A WRIT OF CERTIORARI

The Los Angeles Area Chamber of Commerce submits this brief in support of the United States Environmental Protection Agency's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTEREST OF THE *AMICUS CURIAE*

The Los Angeles Area Chamber of Commerce is an organization of approximately 2,300 members representing various and diverse businesses in the Southern California region. Its membership comprises and employs some of the millions of Californians who stand to lose the most under the decision of the Ninth Circuit.

Chamber members are the primary employers in Southern California. They employ approximately one million people in manufacturing, financial services, health care delivery and international trade. The member companies of the Chamber have headquarters or business operations in the five counties of the South Coast and Ventura air basins in California. Thus, they and their employees would be directly affected by the enforcement of the Federal Implementation Plan (FIP) under the order of the court below.

The purpose of this brief *amicus curiae* is to present information not fully before the Court concerning the extent and severity of the practical consequences of the Ninth Circuit's opinion. Furthermore, the Chamber anticipates that the parties may take opposing positions on the potential impact of the decision on the South Coast economy. The Chamber has sought leave of the Court to file this brief *amicus curiae* to demonstrate that, from the direct perspective of the California residents whose employers would be subject to these regulations, the Ninth Circuit's decision promises widespread hardship. Among the primary interests of the Chamber are both the protection and promotion of the economic health of the Southern California area and the quality of life of Southern California residents, including the value of clean air. As a practical matter, enforcement of the Ninth Circuit's order would directly and adversely affect the region's economy, without materially assisting the region in obtaining clean air.

In presenting information to the Court, the Los Angeles Area Chamber of Commerce brings an important and unique perspective. The members of the Chamber of Commerce are the entities that would be regulated under a FIP and who would need to determine how best to comply with two layers of environmental regulations (i.e., federal and state) in an economic climate where many are finding it difficult to survive. The Chamber will necessarily speak with a more urgent voice than can the regulatory agencies already parties to this action.

Based on the foregoing, the Chamber has a vital interest in obtaining review of the Ninth Circuit's decision.

REASONS FOR GRANTING THE PETITION

This case involves the basic structure of the Clean Air Act Amendments of 1990 (1990 Amendments) and the economic health of the nation's largest industrial area. In 1970, Congress established a regulatory scheme whereby state and local agencies decided upon and enforced the specific combinations of environmental regulations that would best achieve national clean air goals with a minimum of social and economic dislocation in their particular states and localities. 42 U.S.C. 7410(a)(1). This system of state and local responsibility was confirmed in amendments to the Clean Air Act passed in 1977 and 1990. *See e.g.*, 42 U.S.C. 7401(a)(3) (Supp. II 1990). A divided Ninth Circuit panel, however, has decided that the federal government, and not state and local authorities, must design the attainment plan for the South Coast region of California *before* California, the Southern California Association of Governments (SCAG) and the South Coast Air Quality Management District (SCAQMD) have the opportunity, expressly provided by Congress in 1990, to develop their plan.

Review by this Court is warranted for at least two reasons. First, if the petition for a writ of certiorari is denied, the clear and consistent policy choice that lies at

the heart of Congressional efforts to control air pollution—that states should take the primary and initial role in planning—will have been reversed by judicial fiat. Second, the error of the panel below, if not corrected, will cause severe economic and social dislocation to the Los Angeles area, and its thirteen million residents, at precisely the time when it is least able to accommodate it. It is difficult to imagine a worse time to impose duplicate environmental regulations on Southern California businesses. The severe negative consequences of the Ninth Circuit's order on the region constitute special and important reasons for review by this Court. Rules of the Supreme Court, Rule 10.1.

The Chamber supports fully the legal analysis of the 1990 Amendments contained in EPA's petition. This *amicus curiae* brief will, therefore, address only the reasons why, as a practical matter, the adoption of a FIP would impose such an unwarranted and burdensome impact on the region.

The Chamber recognizes that attaining the national ambient air quality standards (NAAQS) may require measures that impose greater social and economic burdens on the Southern California region than are necessary in any other region of the country. In fact, such burdens are the inevitable consequence of the current attainment plan for the region, adopted as a result of the lengthy and comprehensive planning by the California Air Resources Board, SCAG and the SCAQMD, with considerable assistance of numerous local jurisdictions and other state agencies. Previous South Coast plans have been widely recognized as the most ambitious and effective in the country, and the current plan preserves that distinction. It is appropriately stringent, but it has the virtue of spreading its regulatory burdens across the wide and diverse categories of sources that collectively contribute to the region's air quality problem, including large and small businesses, households, commercial establishments

and a wide variety of vehicle and engine types. It thus reflects the complexity recognized by Congress when it granted states the primary planning role. As also intended by Congress, the plan is designed to balance the burdens of regulation with its inevitable significant economic and social impact. In Southern California, then, the Ninth Circuit's order would require EPA to impose a FIP on the region that has conducted the most extensive planning of any in the nation—circumstances virtually the opposite of those envisioned by Congress.[1]

In this context, a FIP will impose severe additional burdens without materially advancing the cause of clean air. The reasons are several: (1) EPA lacks the wide range of tools needed to address the diversity of sources in the South Coast; (2) the FIP process, by its nature, will be hastily crafted and insensitive to local circumstances; (3) over time, the FIP process will be less responsive to emerging technologies and shifting economic and social conditions; and (4) the FIP will create a dual set of regulations and thus confuse and potentially paralyze regulated entities.

In contrast to the wide range of planning and regulatory tools available to state and local government, EPA has, for practical and legal reasons, far fewer tools at its disposal to achieve the required degree of emissions reductions (over 80 percent). As a practical matter, EPA lacks sufficient information about many of the sources for which it would need to set emission standards under

[1] Under the pre-1990 Act, even the nation's best air quality plan, the South Coast plan, was viewed as deficient because it could not project ultimate success. Congress addressed this paradox through the 1990 Amendments by authorizing EPA to judge the adequacy of a plan, in the interim, by its success at meeting interim progress milestones, *see* 42 U.S.C. §§ 7511a(c)(2)(B), 7511a(g), and by allowing the South Coast to demonstrate ultimate attainment by anticipating as yet undeveloped technologies. 42 U.S.C. § 7511a(e)(5). In making these changes, Congress remedied the only deficiencies in the states' plan.

the FIP. This is true, for example, of the many hundreds of small manufacturing facilities, whose emissions are too small to have triggered the pre-1990 Act's definition of "major sources." While EPA developed a series of control technique guidelines (CTGs) for major volatile organic compound (VOC) sources in the late 1970's, it simply lacks sufficient technical familiarity with the range of small VOC sources that do not fall within those CTG categories and that are currently regulated by the SCAQMD plan. The 1990 proposed FIP illustrates this limitation. Instead of setting standards for individual source categories, EPA proposed a blanket 90% reduction for all major stationary source categories in the event that the region failed to meet certain trigger events. *See* 55 Fed. Reg. 36,518 (1990) ("Because EPA has so far been unable to develop implementable control measures for a portion of the VOC inventory, the level of control for most of the backstop measures must be sufficient to reduce 1987 or 1990 base year emissions by 90 percent.") Such an across-the-board strategy, particularly if adopted *in addition to* existing state and local standards,[2] is blind to differences among sources in their ability to control emissions and in the potential impacts of regulation. It is almost inevitable that such an approach will impose hardships that would more easily be avoided by the region's plan.

Likewise, although EPA can enforce minimum national motor vehicle emission standards and certain fuel regulations, it cannot regulate the use of the automobile by

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[2] The proposed 90% FIP requirement would be calculated from 1987 or 1990 base year emissions, notwithstanding the fact that most stationary sources in the basin already have been heavily regulated in past years. Thus, although the SCAQMD plan regulates many of such sources further, a FIP would almost certainly impose additional reduction requirements, regardless of whether the technology for such additional reductions exists. For many sources, the EPA requirement for a 90% reduction beyond 1987 or 1990 levels could only be met by curtailing or shutting down operations.

means of indirect source controls or otherwise require land use restrictions. *See* 42 U.S.C. §§ 7410(a)(5) (regarding limits to EPA's indirect source authority), 7431 (protecting local land use authority). Moreover, to the limited extent EPA can regulate automobile use, it lacks the practical capacity to implement and enforce such regulations. Because it cannot manage the region's transportation programs, the FIP is likely to contain partial bans on the use of vehicles as the only way to address the region's anticipated growth in vehicle miles travelled. *See* EPA Petition for a Writ of Certiroari at 24.

Given its inability to adopt carefully tailored regulations for the complete range of sources in the South Coast basin, EPA would be much better suited to filling gaps in the state plan if it ultimately determines that the plan falls short of the Act's requirements. However, EPA will not know whether and to what extent such gap-filling is necessary until the South Coast attainment plan is submitted in the fall of 1994, two years from now.

In addition to lacking the necessary information and authority to craft an effective FIP, the EPA lacks sufficient time and opportunity for public input. Although the actual schedule for the FIP has not been set, EPA may well be granted a limited time in which to plan. Under stringent time constraints, the Agency will not be able to remedy its lack of information or to solicit and review public comment. Rulemaking at the local level ordinarily requires several steps, involving an initial workshop by the agency to gather information about specific source categories, followed by publication of one or more draft regulations and a series of meetings or hearings for the agency to receive public comment. Often the local agency visits one or more facilities to view operations first hand. This process occurs for each of the over one hundred rules promulgated by the SCAQMD. By contrast, EPA

must propose and promulgate final emission standards for this enormous variety of sources in a limited period of time, all as part of a single rulemaking action. In such a context, EPA will be unable to take into account individual circumstances of specific sources or source categories to any significant degree. As a result, FIP requirements are almost certain to cause unintended adverse impacts on many of the sources the FIP regulates. EPA anticipated these impacts in its 1990 proposal: "The severe backstop emission reduction requirements derive from areawide reduction requirements of the FIP, rather than from the normal Agency assessments of available technologies. As such, they may be costly and disruptive, . . ." 55 Fed. Reg. 36,518 (1990).

A third reason why EPA's FIP regulations would be certain to inflict unwarranted distress on Southern California is that the FIP is less susceptible to change. Under the Act, the state can continue to refine and improve its plan for the South Coast throughout the period from enactment of the 1990 Amendments until attainment in the year 2010. During the interim years, the South Coast can rely on the emergence of technologies that do not yet exist, so long as the region meets interim progress requirements. *See* 42 U.S.C. §§ 7511a(e)(5). Throughout this period, the state may evaluate changes in its emissions inventory (due, for example, to shifting economic and social conditions), and in the available array of emission reduction technologies. Based on these changing conditions, the state would assuredly revise its plan on an ongoing and regular basis. This is encouraged by Congress to achieve the dual goals of clean air and a healthy economy. While, in theory, EPA could continually revise the FIP to reflect similar developments, such flexibility would almost certainly be absent at the federal planning level due to a shortage of necessary resources to continue to track and revise the plan. The lack of flexibility will prevent EPA from capitalizing on

emerging control opportunities and from mitigating unintended impacts when they materialize.

The final reason why the FIP would impose unwarranted and severe burdens on the region is that it would establish a duplicative set of emission standards on regulated entities. Already, sources in the South Coast comply with the most comprehensive set of air quality standards ever enacted, comprising hundreds of pages of detailed provisions. As is amply illustrated by EPA's 1990 proposal, any FIP that does more than fill gaps in state regulation will leave sources uncertain as to whether they should invest in technologies that will meet the current state plan or whether they should instead prepare to meet a different federal standard. Characterizing the federal standard as a "backstop" helps little, of course, because businesses planning for compliance must take into account the contingency that the backstop will be triggered by a state failure to meet federal requirements. This dual planning will inevitably add considerable cost to businesses in the region, and deliver a damaging blow to the region's efforts to retain and attract businesses.

Whatever the ultimate content of a FIP, the EPA's lack of sufficient information and tools to craft a carefully tailored and effective program, the haste with which it would have to act, its inability to respond to future changes in the region, and the burdens of compliance with two sets of regulations make it certain that a FIP would deliver a terrible blow to Southern California when it can least afford it. While such a hammer would arguably be justified if the region had failed to meet its responsibilities under the 1990 Amendments, that is clearly not the case here, as the current South Coast plan is the most comprehensive and aggressive plan enacted anywhere in the country.

Now, especially, the California economy requires the care, precision and subtlety of the state implementation

plan (SIP) process. The Los Angeles region is a vibrant community, with a dynamic yet fragile economy in which change—in demographics, economics, and technology—is the only constant. The region needs a planning approach that is able to adapt to and capitalize on everyday changes. Mindful of this fact, Congress confirmed in the 1990 Amendments that state and local governments were to play the primary role in crafting attainment strategies. The EPA, on the other hand, is for practical reasons institutionally incapable of meeting the attainment goals of the Clean Air Act for the South Coast without causing substantial disruption. Its failures would stem not from any inherent weakness in the EPA itself but rather from the Ninth Circuit's attempt to force the FIP process into a situation in which Congress did not intend it to be used. As fully developed by the Solicitor General's Petition, the plain language of the 1990 Amendments to the Clean Air Act, as well as its legislative history, demonstrate that Congress did not intend a result, as ordered by the Ninth Circuit that is impracticable, unwise and harmful to the region.

CONCLUSION

There are special and important reasons for review of the Ninth Circuit's decision. This case involves questions of enormous practical significance for the people of the South Coast and other areas of California. Congress granted the state and the region the time to craft an attainment program with care. If EPA's petition is denied, the citizens and businesses of the Los Angeles area will be denied that opportunity. Instead, the federal government will make the choices for them. Without the necessary time, tools and process, EPA will necessarily adopt a FIP that imposes unwarranted social and economic hardship. The Chamber believes the degree of such impact could be staggering. It need not be so. The Chamber respectfully urges the Court to grant the petition for writ of certiorari or, in the alternative, based on the

compelling legal arguments articulated in EPA's petition, to consider summary reversal.

Respectfully submitted,

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